No. 90-285-CFX
Status: GRANTED

Title: Litton Financial Printing Division, A Division of Litton Business Systems, Inc., Petitioner
v.
National Labor Relations Board, et al.

Docketed:
August 14, 1990

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Diederich,Mathias J.

Counsel for respondent: Solicitor General, Rosenfeld,David A.

Entry	Date	Note	Proceedings and Orders
1	Aug 14 1990	G	Petition for writ of certiorari filed.
2	Sep 17 1990		Waiver of right of respondent Intervenor David A. Rosenfeld to respond filed.
4	Sep 18 1990		Order extending time to file response to petition until October 22, 1990.
5	Oct 22 1990		Brief of respondent NLRB in opposition filed.
6	Oct 24 1990		DISTRIBUTED. November 9, 1990
8	Nov 13 1990	X	Reply brief of petitioner Litton Financial Printing Division, etc. filed.
9	Nov 13 1990		Petition GRANTED. limited to Question 2 presented by the petition.
			**********
10	Dec 12 1990		Joint appendix filed.
11	Dec 19 1990		Brief of petitioner Litton Financial Printing Division, etc. filed.
12	Dec 28 1990		Brief amicus curiae of Chamber of Commerce of the United States filed.
13	Dec 28 1990		Brief of respondent NLRB (In Support of Petitioner) filed.
14	Jan 3 1991	G	Motion of the Solicitor General for divided argument filed.
15	Jan 14 1991		Motion of the Solicitor General for divided argument GRANTED.
16	Jan 24 1991		Record filed.
		*	Certified copy of original record received.
17	Feb 1 1991		SET FOR ARGUMENT WEDNESDAY, MARCH 20, 1991. (2ND CASE)
18	Feb 1 1991		Record filed.
		*	Certified copy of C. A. Proceedings received. (2 volumes).
19	Feb 4 1991		Brief of respondent Printing Specialties and Paper Products Union filed.
20	Feb 6 1991		CIRCULATED.
21	Feb 21 1991	X	Reply brief of petitioner Litton Financial Printing Division filed.
22	Mar 7 1991	X	Brief of respondent NLRB in support of petition filed.
23	Mar 20 1991		ARGUED.

90-285

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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A DIVISION OF LITTON BUSINESS SYSTEMS, INC.

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QUESTIONS PRESENTED

1. When an employer has made a decision to partially close its business which is not subject to mandatory bargaining, does Section 8(a)(5) of the National Labor Relations Act require it to bargain over the consequent termination of the employees employed in the shutdown operation?

2. When the facts upon which a seniority-related grievance is based occur almost one year after the expiration of the collective bargaining agreement recognizing seniority and requiring arbitration, does Section 8(a)(5) of the National Labor Relations Act require the employer to submit to the arbitration of the grievance?

PARTIES TO THE PROCEEDING*

The name of the only party to the proceeding in the Court of Appeals for the Ninth Circuit which is not listed in the caption of the case in this Court is:

Printing Specialties District
Council No. 2, as successor to
Printing Specialties District
Council No. 1

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* Litton Industries, Inc. is the parent corporation of the petitioner, Litton Financial Printing Division, a Division of Litton Business Systems, Inc.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Litton Financial Printing Division, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on January 16, 1990.

REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals delivered below is reported at 893 F.2d 1128 (attached herein as Appendix A). The decision and order of the National Labor

Relations Board which the Court of Appeals reviewed are reported at 286 NLRB No. 79 (attached herein as Appendix B).

JURISDICTION

The judgment of the Court of Appeals was dated January 16, 1990 and entered on January 16, 1990 (attached herein as Appendix C). An order of the Court of Appeals denying a petition for rehearing and rejecting a suggestion for rehearing en banc was filed May 31, 1990 (attached herein as Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 8(a) of the National Labor Relations Act, 29 U.S.C. §158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer —
>
> (5) to refuse to bargain collectively with the representatives of his employees . . . .

Section 8(d) of the National Labor Relations Act, 29 U.S.C. §158(d), provides in relevant part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the

> negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

STATEMENT OF THE CASE

1. Background

Petitioner ("Litton") operated a printing plant in Santa Clara, California, where the production employees were represented by the Printing Specialties District Council ("Union"). The last collective bargaining agreement between Litton and the Union expired October 5, 1979. Litton used two printing methods: cold-type and hot-type. For business reasons, Litton closed down its cold-type operation and laid off the ten employees working in that operation on August 29 and September 2, 1980. The Union attempted to grieve the layoffs, contending Litton had not followed seniority in selecting the employees to be laid off. Litton rejected the Union's attempt to grieve under an agreement which had expired some eleven months earlier but did offer to bargain over the effects of the layoffs. The Board's Regional Director issued an unfair labor practice complaint against Litton, alleging the Company had not bargained with the Union over its decision to lay off the ten employees and had refused to adhere to the grievance-arbitration provisions in the expired labor agreement.

2. Board Decision

The Board decided (Board Chairman Dotson dissenting), contrary to the Administrative Law Judge (ALJ), that Litton had an obligation to bargain with the Union regarding its decision to lay off the ten employees working in the shut-down, cold-type operation. The Board also found that Litton had engaged in a blanket refusal to grieve and arbitrate disputes in violation of Section 8(a)(5) of the Act, but, since the Union's grievances were not ones which arose under the expired agreement, the Board, contrary to the ALJ, held Litton had no obligation to arbitrate the grievances.

3. Court of Appeals Decision

The Court of Appeals, agreeing with the Board, held that Litton had an obligation to bargain with the Union regarding its decision to lay off the ten employees working in the cold-type operation which had been shut down and had violated Section 8(a)(5) of the Act by failing to bargain. The court held the Board's conclusion the layoff grievances did not arise under the expired collective bargaining agreement was unreasonable and reversed the Board's decision not to compel Litton to arbitrate those grievances, and remanded the cause "for further proceedings in accordance with this opinion." (App. A22)

4. Basis of Jurisdiction in Court of Appeals

The basis for jurisdiction in the Court of Appeals is Section 10(e) of the National Labor Relations Act. 29 U.S.C. §160(e).

ARGUMENT

1. Reasons for Granting the Writ

With respect to the decision of the Court of Appeals that Litton was obligated to bargain with the Union before it could lay off the employees working in the shut-down, cold-type operation, the Court of Appeals has decided a federal question in a way which is in conflict with the decision of this Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Further, petitioner submits the Court of Appeals has misapprehended *First National* by treating it as a decision to be applied on a case-by-case basis, which conflicts with a decision of the Court of Appeals for the Fourth Circuit, which holds that the decision in *First National* creates a per se rule. *Arrow Automotive Industries, Inc. v. NLRB*, 853 F.2d 223 (4th Cir. 1988).

With respect to the decision of the Court of Appeals that Litton was obligated, under Section 8(a)(5) of the Act, to arbitrate a dispute with the Union over layoffs outside of seniority when the layoffs occurred almost one year after the expiration of the collective bargaining agreement, petitioner submits the Court of Appeals has expanded the holding of this Court in *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, CFL-CIO*, 430 U.S. 243 (1977), far beyond what was ever intended by this Court. In addition, the Court of Appeals has rendered a decision which is in conflict with the decisions of other Courts of Appeals on the same matter, as well as another decision of the Court of Appeals for the Ninth Circuit. *Local 703, International Brotherhood of Teamsters v. Kennecott Bros. Co.*, 771 F.2d 300 (7th Cir. 1985). *Chauffeurs, Teamsters and Helpers Local Union 238 v. C.R.S.T., Inc.*, 795 F.2d

1400 (8th Cir. 1986). *United Food & Commercial Workers International Union, AFL-CIO, Local 7 v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990). *The O'Connor Company, Inc. v. Carpenters Local Union No. 1408*, 702 F.2d 824 (9th Cir. 1983).

2. Litton's Decision to Lay Off Ten Employees Was Not a Subject of Mandatory Bargaining.

It is not disputed that Litton had no obligation to bargain with the Union over its decision to shut down its cold-type printing operations. The cold-type process produced printing of an inferior quality which resulted in the loss of a major customer. Cold-type printing was inefficient because it required more processing than hot-type printing. Litton operated other plants which used hot-type printing; therefore, if the Santa Clara plant converted solely to hot-type printing, work could be moved from plant to plant in an emergency. Training, research and development and equipment costs could be lowered if all Litton plants used the hot-type printing method. Clearly, the decision to convert the Santa Clara plant from a plant utilizing both cold- and hot-type printing into one utilizing solely the hot-type method was the type of decision insulated from mandatory bargaining by this Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

In *First National*, this Court held that a maintenance company's decision to terminate its service contract with one of its customers and discharge the employees who worked at that location, was not a subject of mandatory bargaining. The Court emphasized the employer's need for unencumbered decisionmaking, the need for certainty as to legal requirements, the availability to the Union of

"effects" bargaining, management's need for speed and flexibility and the inclination of unions to use bargaining as a tool for delay. In *First National*, both the majority and dissenting opinions stated the issue before the Court as one involving the termination of an operation *and* the discharge of the employees employed in that operation. 452 U.S. at 671 and 688. This Court specifically raised and rejected the argument that "had (the Union) been given an opportunity to talk, something might have been worked out to transfer these people to other parts of (the) business . . . ." 452 U.S. at 670. In the instant case, the Administrative Law Judge correctly applied the teaching of *First National* and concluded Litton had no obligation to bargain over the layoffs, stating:

> Thus, I further believe that both decisions (to eliminate the cold-type operation and lay off employees) were, and remain, inextricably intertwined, much as the employer's decisions, in *First National Maintenance, supra*, to partially close down and to terminate a crew were inseparable. (App. B9)

Board Chairman Dotson's dissent recognized the applicability of *First National*, stating:

> As the Supreme Court recognized in . . . *First National Maintenance* . . . certain management decisions may result in the loss of jobs and yet be outside the bargaining obligation. Indeed, as the Court stated in *First National Maintenance* . . .
>
> > Management must be free from the constraints of the bargaining process to the extent essential for

> the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. . . . [I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business. [Footnote omitted.]
>
> My colleagues have ignored these dictates. To require (Litton) to bargain over the layoff, which was part and parcel of its decision to convert its machinery, would severely undermine (Litton's) 'need for unencumbered decisionmaking.' (App. B26-27)

The practical effect of the decision of the Court below is to render the opinion of Justice Blackmun in *First National* meaningless, for it means nothing to an employer to say, "Yes, you may decide to shut down an operation, but you cannot lay off the employees in that operation until you have bargained with the Union." The requirement to bargain over laying off employees working in a closed-down operation destroys the certainty, speed and flexibility which an employer needs to

run its business and leaves the employer at the mercy of a union bent on delay. The breadth of the alternatives available for bargaining relied upon by the Court below points up the absurdity of requiring bargaining over the layoffs (App. A11). Because of the difficulty in scheduling bargaining sessions and the union's right to reams of information relevant to those alternatives, a union which always remained willing to talk could drag negotiations on for months.

Litton submits the holding of this Court in *First National* established a "per se" rule that the partial closing of a business and consequent layoff of employees working in that part of the business shut down does not require bargaining. In *Arrow Automotive Industries, Inc. v. NLRB*, 853 F.2d 223 (4th Cir. 1988), the Court of Appeals for the Fourth Circuit noted "a majority of commentators, including those who harshly criticize the *First National Maintenance* result, agree that the decision established a *per se* rule that an employer has no duty to bargain over a decision to close part of the business." 853 F.2d at 227. This is necessarily so if this Court's objectives in *First National* are to be obtained. If the Board and a Court of Appeals can treat each partial closing and consequent termination of employees on a case-by-case basis, no employer will ever be able to proceed with a partial closing and consequent terminations free from the fear that ten years later, as in the instant case, a court may find it has committed an unfair labor practice. This possibility hardly comports with what this Court had in mind when it spoke of management's need for certainty, speed and flexibility and recognized a union's ability to prolong negotiations. Indeed, this case is the horror story which this Court sought to avoid in *First National* when it said, "Management . . . also must have some degree of

certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice . . . ." 452 U.S. at 679. By separating the decision to shut down an operation from the consequent termination of the employees working in that operation and subjecting the layoffs to collective bargaining, the Court below has nullified *First National*. The petition should be granted.

3. There Is No Obligation Under Section 8(a)(5) of the National Labor Relations Act to Arbitrate Seniority Grievances Based Upon Facts Which Occur Long After Contract Expiration.

In *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, CFL-CIO*, 430 U.S. 243 (1977), the Court (Stewart and Rehnquist dissenting) held that a presumption existed favoring arbitrability where there was a dispute over a provision in an expired agreement, which presumption could be negated expressly or by clear implication. In *Nolde Bros.*, the dispute involved severance pay provided for in an expired contract. The dispute arose four days after contract expiration, and the Court limited its holding by stating ". . . we need not speculate as to the arbitrability of post-termination contractual claims which, unlike the one presently before us, are not asserted within a reasonable time after the contract's expiration." 430 U.S. at 256, n. 8.

In the instant case, the no-strike clause in the expired agreement (Section 20, entitled "Strikes-Lockouts") specifically provided, ". . . the Union and its members, individually and collectively, agree that there shall be no

strikes, boycotts, sitdowns, stoppages of work or any other forms of interference with production or other operations on the part of the employees during the term of this Agreement." (App. A4) Thus the Court below has failed to confine *Nolde Bros.* within its limits, for the Union's reservation of the right to strike after "the term of this Agreement" clearly negates any presumption the parties intended to arbitrate post-expiration disputes. As the dissent in *Nolde Bros.* points out:

> And the Union's termination of the contract, thereby releasing it from its obligation not to strike, foreclosed any reason for implying a continuing duty on the part of the employer to arbitrate as a quid pro quo for the Union's offsetting, enforceable duty to negotiate rather than strike. (Citation omitted.)

It is contrary to *Nolde Bros.* that the Union in the instant case can be relieved of its contractual obligation not to strike upon the contract's expiration but the Company must arbitrate grievances which are based on facts which occur eleven months after the contract has expired.

Nolde Bros. involved Section 301(a), 29 U.S.C. §185(a) of the Labor Management Relations Act, 1947.[1] In 1985, in another Section 301(a) suit, the Court of Appeals for the Seventh Circuit declined to order the

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[1] Section 301(a) provides: Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

arbitration of a post-contract termination dispute "because we believe that *Nolde* is distinguishable on other grounds: the length of time between expiration of the contract and the events triggering the grievance." *Local 703, International Brotherhood of Teamsters v. Kennecott Bros. Co.*, 771 F.2d 300 at 303 (7th Cir. 1985). The Court reasoned that the *Nolde Bros.* presumption favoring arbitration weakens as time passes; otherwise, parties could be bound to arbitration for years or even decades after the expiration of a contract. In *Kennecott*, six months passed between expiration date and grievance events. In 1986, the Court of Appeals for the Eighth Circuit decided *Chauffeurs, Teamsters and Helpers Local Union 238 v. C.R.S.T., Inc.*, 795 F.2d 1400 (8th Cir. 1986), another Section 301(a) suit, where the union sought to compel arbitration under an expired agreement even though the event triggering the grievance arose more than a year after contract expiration. The court, in part, based its decision on the passage of time, stating, "Moreover, the passage of more than one year between the expiration of the contract and the employees' discharge also makes application of the *Nolde* presumption of doubtful propriety." 795 F.2d at 1404. In 1983, the Court of Appeals for the Ninth Circuit decided *The O'Connor Company, Inc. v. Carpenters Local Union No. 1408*, 702 F.2d 824 (9th Cir. 1983). The court specifically noted the contract expired June 15, 1980 and the grievance concerned a complaint arising on March 31, 1981. The court stated:

> The Union contends that even though the collective bargaining agreement had terminated, the obligation to arbitrate continued, even as to matters occurring after termination of the agreement.

* * *

> The question now before the court is whether the Company in this case had a continuing obligation to arbitrate grievances which arose after the expiration of the collective bargaining agreement. This question must be answered in the negative.

* * *

> The Union's position in this case is untenable because the labor dispute involved here arose following termination of the old contract and was not covered by that contract. 702 F.2d at 824-825.

On March 1, 1990, the Court of Appeals for the Tenth Circuit decided a case directly in conflict with the decision of the court below. *United Food & Commercial Workers International Union, AFL-CIO, Local 7 v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990). In *Gold Star*, the court analyzed several grievance disputes which arose months after contract expiration and found they were not arbitrable because they did not "arise under" the collective bargaining agreement. Two of the grievances involved violation of seniority rights conferred by the expired agreement. The court stated:

> Two of the grievances involve violations of seniority rights conferred by the old contract. The courts unanimously hold that '(s)eniority is not only born from the collective bargaining agreement; it does not exist apart from that contract.' *Cooper v. General Motors Corp.*, 651 F.2d 249,

> 251 (5th Cir., Unit A, 1981) (citing cases) . . . . Therefore, none of the disputes in these cases are subject to compulsory arbitration under the expired agreement. 897 F.2d at 1026.

In the case below, the court reversed the Board's decision not to compel Litton to arbitrate the layoff-out-of-seniority grievances because it disagreed with the Board's conclusion the grievances did not "arise under" the expired collective bargaining agreement. (App. A22)[2]

Petitioner submits the court below has stretched *Nolde Bros.* beyond its limits for another reason. *Nolde Bros.* involved a suit brought under Section 301(a) of the Labor Management Relations Act, which appears to be the proper legal avenue for testing whether or not a post-expiration dispute is arbitrable. But the instant case involves an allegation Litton violated Section 8(a)(5) of the National Labor Relations Act. Section 8(d) of the Act very specifically defines an employer's obligation under Section 8(a)(5). It seems pure fiction to hold that a refusal to arbitrate a dispute based on facts transpiring almost one year after contract expiration is the same thing as refusing (in the words of Section 8(d)) ". . . to meet at reasonable times and confer in good faith with

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[2] In reality, the provision in Litton's expired collective bargaining agreement did not provide for layoffs on the basis of strict seniority. Rather, under the expired agreement, ". . . in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal." In a case decided by the Board subsequent to its decision in the instant case, which specifically distinguished the *Litton Case*, the Board explained that considerations of aptitude and ability preclude arbitration because aptitude and ability do not "arise under" a contract. *United Chrome Products, Inc.*, 288 NLRB No. 130 (1988).

respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of written contract incorporating any agreement reached if requested by either party . . . ." Litton's refusal to allow a third person to decide a dispute between Litton and the Union clearly is not a refusal to meet with the Union at reasonable times and confer in good faith.

CONCLUSION

In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), Justice Blackmun authored an opinion for the Court which established a very important point of law for the business community: that an employer could partially close its business and terminate the employees working in that part of the business without going through the time-consuming process of negotiating with a union. This case is important to employers because it enables them to act with speed and flexibility and free from the uncertainty of legal challenges to its actions which might not be resolved for years (over 10 years in the instant case). The court below has undone all that by separating management's action into two decisions, one not bargainable but the other subject to all of the delays and uncertainties attendant to collective bargaining. But, as the ALJ concluded in this case over eight and one-half years ago, the decisions to shut down an operation and lay off employees are too closely related to separate if *First National* is to have any meaning at all. In effect, the court below has reversed *First National* in the Ninth Circuit, and the petition for certiorari should be granted.

The petition should also be granted with respect to the decision of the court below on the arbitration issue.

Unlike here, *Nolde Bros.* did not involve Section 8(a)(5). *Nolde Bros.* involved an "accrued" right, severance pay. Unlike here, *Nolde Bros.* was a case where only four days had passed between contract expiration and dispute, and the *Nolde Bros.* Court expressly limited its decision to cases where there was a short span between contract expiration and dispute. There is a difference of opinion between circuits on the role which the passage of time plays when a party seeks to arbitrate a post-expiration dispute. There is a difference of opinion between the circuits with respect to whether seniority arises under a contract. The arbitration issue is one which arises often and is a source of considerable litigation, as evidenced by the cases which have reached the Board and the Court of Appeals level.[3]

The petition should be granted.

Respectfully submitted,

M. J. DIEDERICH

Counsel of Record
for Petitioner

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[3] See, in addition to the cases above, *Seafarers International Union v. National Maritime Services*, 820 F.2d 148 (5th Cir. 1987) and *Federal Metals Corp. v. United Steelworkers of America (AFL-CIO)*, 648 F.2d 856 (3rd Cir. 1981), *cert. denied*, 454 U.S. 1031 (1981).

APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, PRINTING SPECIALTIES DISTRICT COUNCIL NUMBER 2, as successor to Printing Specialties District Council Number 1, Petitioner-Intervenor, v. LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC., Respondent.	No. 88-7065 NLRB No. 32-CA-3160
PRINTING SPECIALTIES DISTRICT COUNCIL NUMBER 2, as successor to Printing Specialties District Council Number 1, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 88-7079 NLRB No. 32-CA-3160 OPINION

Application for Enforcement and
Petition for Review of an Order of the
National Labor Relations Board

Argued and Submitted
January 11, 1989 — San Francisco, California
Filed January 16, 1990

Before: Jerome Farris, Robert Boochever and
Cynthia Holcomb Hall, Circuit Judges.
Opinion by Judge Hall

OPINION

HALL, Circuit Judge:

In No. 88-7065, the National Labor Relations Board ("NLRB" or "the Board") seeks enforcement of an order it issued against employer Litton Financial Printing Division ("Litton") on November 6, 1987. In No. 88-7079, Printing Specialties District Council Number 2 ("the Union"), petitions this court for review of the same Board order. The instant dispute arose in 1980 when Litton decided to close down the "cold-type" printing operation in its Santa Clara, California, plant, to expand its more efficient "hot-type" operation in the same plant, and to lay off ten employees who had worked primarily on "cold-type" equipment. At that time, the last of a series of collective bargaining agreements ("CBAs") had expired and Litton was refusing to recognize or bargain with the Union.

In the proceedings below, the Board found that Litton violated sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act ("NLRA" or "the Act") by refusing to bargain over the layoffs, by directly dealing with the laid-off employees over severance pay, by refusing to accept or process grievances filed to protest the layoffs as violative of seniority rights, and by effectuating a wholesale repudiation of its obligations under the contractual grievance-arbitration provisions. To remedy these unfair labor practices, the Board issued a "cease and desist" and limited backpay order. The Board also ordered Litton to process the layoff grievances through the first two steps of the grievance-arbitration procedure, to bargain over the layoff decision, and to post

appropriate notices. The Board declined, however, to order Litton to arbitrate the layoff grievances.

On appeal, Litton argues: (1) that the layoff was not a mandatory subject of bargaining, and that it had fulfilled its statutory obligation to bargain over the "effects" of the layoff decision; (2) that the grievance-arbitration provisions of the CBA expired in October of 1979 along with the contract or, at a minimum, had become ineffective by the time the grievances were filed almost a year later; (3) that the Board erred in finding a wholesale repudiation by Litton of its obligations under the grievance-arbitration process contained in the expired CBA.

In its appeal, the Union argues that the Board erred in its interpretation of section 8(a)(5) by relying on case law under section 301 of the Act, 29 U.S.C. § 185, to hold that the layoff grievances in this case are not encompassed within Litton's duty to arbitrate post-expiration grievances that "arise under" the expired CBA. The Union further maintains that the correct legal framework for analyzing an employer's refusal to process and arbitrate post-expiration or hiatus grievances is under the case law holding that an employer violates section 8(a)(5) by imposing a unilateral change in a term or condition of employment, *i.e.*, a "mandatory subject of bargaining," without bargaining to impasse. Accordingly, the Union seeks reversal of the Board's order insofar as it declined to compel arbitration of the layoff grievances.

I

Most of the facts relevant to decision of this appeal are undisputed or were found by an administrative law judge ("ALJ") in a hearing held on March 19, 1981. The

employer in this case, Litton Financial Printing Division, is a division of Litton Business Systems, Inc., in the business of printing bank checks. Printing Specialties District Council Number 2 is the successor to the exclusive bargaining representative for the production and maintenance employees at Litton's plant in Santa Clara, California, the only one of six Litton printing facilities involved in this case. Beginning in 1974, Litton and the Union were parties to successive CBAs. The last such contract expired on October 5, 1979.[1]

Prior to August 1980, Litton used both cold-type and hot-type printing processes at its Santa Clara plant; its other five plants used only the hot-type process. In July 1980, Litton decided to convert the Santa Clara facility

[1] Sections 19 and 21 of the expired CBA contained a three-step grievance-arbitration procedure which provided:

> "Differences that may arise between the parties hereto regarding this Agreement and any alleged violations of the Agreement, [and] the construction to be placed on any clause or clauses of the Agreement shall be determined by arbitration in the manner hereinafter set forth [in section 21]."

In a rather unusual provision, section 21 goes on to describe the three steps of the grievance-arbitration procedures, but also contains its own "no-strike clause" which provides that "there shall be no suspension or interruption of work on account of [an employee grievance as to the interpretation or application of the terms of this Agreement] . . . ." There is a general "no-strike clause" in section 20 that is expressly limited to "the term of this Agreement."

With respect to layoffs, the CBA provided that:

> "Whenever [the] Employer intends to lay off all or part of his employees, he shall give notice of such intention no later than quitting time of the previous working day. It is also understood that in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal."

to an entirely hot-type operation after one of its major customers, Wells Fargo Bank, canceled 30 per cent of its cold-type print orders. A Litton representative testified that this decision was based on four factors: (1) the loss of the Wells Fargo and other customer orders; (2) the greater economy of the hot-type process by which more checks could be printed on a single sheet of paper; (3) the increased flexibility to have other Litton plants take over the Santa Clara plant's work in emergencies; (4) the reduction in training, research and development, and equipment costs. To accomplish the planned conversion, Litton transferred some of its cold-type work to other plants, sold some of its cold-type equipment, and acquired additional hot-type equipment.

The instant dispute arose on August 29 and September 2, 1980, when Litton laid off ten of the 42 workers in the Santa Clara plant bargaining unit. Seven of the laid-off employees had worked exclusively on cold-type equipment; the other three had worked primarily, but not exclusively, on cold-type equipment. The layoffs were uncontrovertedly effectuated without notice to the Union, and were not in accordance with seniority. In fact, six of the eleven most senior employees in the Santa Clara bargaining unit were among those laid off. Litton dealt directly with the individual laid-off employees to give them severance pay without giving notice to or bargaining with the Union over that issue.[2]

[2] No exceptions were filed by Litton to the ALJ's finding that this direct dealing violated section 8(a)(1) and 8(a)(5) of the NLRA. Litton's failure to contest this finding in its brief, constitutes a waiver. *NLRB v. Nevis Industries, Inc.*, 647 F.2d 905, 908 (9th Cir. 1981). The portion of the Board's order based on this finding is entitled to summary enforcement under section 10(e) of the Act. 29 U.S.C. § 160(e).

The affected employees notified the Union of the layoffs; the Union, in turn, filed separate but identical grievances for each one alleging "unjust layoff . . . out of seniority." By letter dated September 24, 1980, the Union's business agent notified Litton that the grievances had been filed by the shop steward, and requested that the employer meet with Union representatives to discuss the layoff and its impact on the senior employees who were dismissed. The Union also requested that the laid-off employees be reinstated pending resolution of the grievances. In a letter dated November 10, 1980, the Union reiterated its demand to utilize the grievance-arbitration procedures and bargain about "both the decision to layoff the workers and the effects upon those employees," and requested relevant information.

Litton refused to process the layoff grievances, maintaining that it had no obligation to do so because the CBA containing the grievance and arbitration procedures had expired. Although it expressed a willingness to bargain over the "effects" of the layoffs, Litton has consistently refused to bargain over the "decision" to lay off the ten employees.

On these facts, a majority of the Board panel found, in agreement with the ALJ, that Litton was obligated to continue processing grievances during the hiatus period under its expired agreement. The Board also ruled that Litton's refusal to do so constituted a wholesale repudiation of its contractual obligations under the grievance and arbitration provisions of the expired contract and was, therefore, a violation of sections 8(a)(5) and 8(a)(1) of the Act.

The Board also decided, contrary to the ALJ, that Litton's obligation to bargain about the effects on unit employees of its decision to convert its Santa Clara operation from cold-type to hot-type processes included

a duty to bargain about its decision to lay off the ten employees. The Board, therefore, concluded that Litton's refusal to bargain upon demand by the Union over these mandatory subjects of bargaining was a further violation of sections 8(a)(5) and 8(a)(1) of the Act.

In its order, the NLRB required Litton to cease and desist from engaging in the unfair labor practices found. The Board also ordered Litton, upon the Union's request to: (1) process the layoff grievances under the first two steps of the grievance procedure found in the expired CBA; (2) bargain with the Union over the layoffs as effects of its decision to convert to a hot-type operation; (3) pay backpay to the ten laid-off employees in accordance with *Transmarine Navigation Corp.*, 170 N.L.R.B. 389 (1968), *on remand from* 380 F.2d 933 (9th Cir. 1967); and (4) post appropriate notices. The Board and the Union jointly seek enforcement of the Board's order as heretofore described.

In the portion of its order challenged by the Union, the Board declined to order Litton to arbitrate the layoff grievances. The Board asserted that these grievances, which were based on conduct occurring after the CBA expired, did not "arise under" the contract and that Litton, therefore, had no legal or contractual obligation to arbitrate them.

II

In general, an order of the National Labor Relations Board must be enforced if the Board correctly applied the law, and if the Board's findings of fact are supported by substantial evidence on the record viewed as a whole. *Oil, Chemical & Atomic Workers Int'l Union, Local 1-547 v. NLRB*, 842 F.2d 1141, 1143 n. 1 (9th Cir.

1988); *Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381, 1384-85 (9th Cir. 1984).

III

Sections 8(a)(5) and 8(d) of the National Labor Relations Act require an employer to bargain with its employees' exclusive bargaining representative over "terms or conditions of employment." 29 U.S.C. §§ 158(a)(5) and 158(d). Congress has assigned to the NLRB the primary task of interpreting these provisions. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979). Because the classification of bargaining subjects for purposes of section 8(d) of the Act is " 'a matter concerning which the Board has special expertise,' " an NLRB conclusion that a matter is a mandatory subject of bargaining within the meaning of section 8(d) is entitled to considerable deference. *Id.* (quoting *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 685-86 (1965)); *see also NLRB v. Financial Institution Employees of America Local 112*, 475 U.S. 192, 202 (1986) (recognizing the Board's broad authority to interpret provisions of the Act and the courts' traditional deference to Board constructions that are not irrational or inconsistent with the Act).

This court should not, moreover, reject a reasonably defensible construction by the Board of section 8(d) merely because we would prefer a different view of the statutory provision. *Ford Motor Co.*, 441 U.S. at 497. Such a construction must be upheld unless the proper legal standard was not applied, or the Board failed to give the plain language of the standard its ordinary meaning, or the Board's interpretation is fundamentally inconsistent with the structure of the Act and an attempt to usurp major policy decisions properly made by Congress, or the Board has moved into a new area of regulation which Congress has not committed to it. *Id.*

[1] The Supreme Court has held that the language of section 8(d) "plainly cover[s] termination of employment." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210 (1964). In particular, layoffs have consistently been held to be a mandatory subject of bargaining, and unilateral layoffs by employers violate section 8(a)(5). *Local 512, Warehouse and Office Workers' Union v. NLRB*, 795 F.2d 705, 710-11 (9th Cir. 1986). *See also NLRB v. Carbonex Coal Co.*, 679 F.2d 200, 204 (10th Cir. 1982); *Gulf States Manufacturers, Inc.*, 261 N.L.R.B. 852, 853, 864 (1982), *enf'd in pertinent part*, 704 F.2d 1390, 1395-99 (5th Cir. 1983). Litton argues, however, that there is no duty to bargain about layoffs that are "closely related to" or "naturally follow" from a management decision that is not itself a mandatory bargaining subject. Litton acknowledges only a duty to bargain over the "effects" of such layoffs, and contends that it has always been and remains willing to meet with the Union to discuss that issue.

[2] Litton was not required to bargain with the Union about its economically-motivated decision to convert from cold-type printing to a hot-type process in its Santa Clara plant. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981). The Court in *First National Maintenance* squarely faced and rejected an argument that such a management decision to shut down part of a business was a mandatory subject of bargaining. It reasoned that the harm that was likely to the employer's need of freedom to decide whether to shut down part of its business, purely for economic reasons, outweighed the incremental benefit that might have been gained through the union's participation in making the decision. *Id. Cf., Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. at 215 (management decision to replace employees in existing bargaining unit with those of independent

contractor to do the same work under similar conditions is a mandatory subject of bargaining).

[3] Just as clearly, however, Litton was required to bargain with the Union in this case over the "effects" of its decision to discontinue its cold-type printing operation. The Court in *First National Maintenance* repeatedly emphasized that it was not disturbing case law embodying the well-established principle that employers are required, as part of the "effects" bargaining mandated by section 8(a)(5), to bargain in a meaningful manner and at a meaningful time about "matters of job security" that arise in connection with a partial closing. 452 U.S. at 677-78 n. 15; *id.* at 681-82 (citing *NLRB v. Royal Plating & Polising Co.*, 350 F.2d 191, 196 (3d Cir. 1965), and *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966)).[3] In fact, the Court declared in a footnote,

[3] At this point in its opinion, the Court in *First National Maintenance* seemed to be including " 'termination of employment which . . . necessarily results' from closing an operation" within the scope of mandatory "effects" bargaining over "matters of job security." 452 U.S. at 681 (quoting *Fibreboard*, 379 U.S. at 210). A very narrow reading of *First National Maintenance* would be that only the precise decision to terminate its contract with Greenpark was nonbargainable, and that the Court meant to require the employer to bargain about discharging employees who had worked at the Greenpark facility. As Litton observes, such a narrow reading of *First National Maintenance* approaches absurdity.

The Court almost certainly viewed the two decisions, in the circumstances of that case, as one and the same. For example, the Court stated that the case before it concerned a "management decision . . . that had a direct impact on employment, since jobs were *inexorably eliminated* by the termination" of part of the employer's business operations. 452 U.S. at 677 (emphasis added). The Court also distinguished the employer's "decision to terminate its Greenpark service operation and its consequent discharge of the employees" from "the effects of the termination." 452 U.S. at 671.

(continued)

"There is no doubt that petitioner [First National Maintenance] was under a duty to bargain about the results or effects of its decision [to close down part of its business], or that it violated that duty." 452 U.S. at 679 n. 15.

[4] The question for decision here then is whether the Board could reasonably conclude, after *First National Maintenance*, that a layoff following a conversion or partial-closing decision, such as the one involved in this case, is a mandatory subject of bargaining as an "effect" of the nonbargainable management decision. In this case, unlike *First National Maintenance*, the termination of employees by layoff was not the inevitable consequence of the underlying management decision. Litton had numerous, and admittedly feasible, alternatives[4] that it could have explored with the Union to avoid or reduce the scope of the layoff without having to

(ftn. continued)

A better reading of *First National Maintenance* is that on the facts presented to the Court — *i.e.*, that the employer contracted to provide its customers with maintenance services, hired personnel separately for each customer, and did not transfer employees between locations — the decision to terminate the contract with a particular customer, the Greenpark nursing home, was essentially identical to the decision to terminate its employees who had provided Greenpark with maintenance services. The only meaningful "effects" bargaining required in such a case would be over matters such as severance pay. *See* 452 U.S. at 677-68 [*sic.*] n. 15.

[4] The Board recognized the following alternatives that Litton could have pursued: retraining the "cold-type" employees to work on the new hot-type equipment; transferring the displaced senior employees to its other plants or other positions within the same plant; going to a shortened workweek, or employing a system of rotating layoffs, to divide the remaining work among all the employees. All of these alternative courses of action would have been consistent with the decision to convert to a "hot-type" printing operation, and could have been discussed without calling into question the underlying management decision.

reconsider its conversion decision. Litton suggests no reason other than labor costs for preferring the layoff over any of the suggested alternative courses of action; to the extent the layoff was motivated by a desire to reduce labor costs, it was amenable to bargaining. *First National Maintenance,* 452 U.S. at 680. While not dispositive, these facts distinguish the instant case from the situation in *First National Maintenance* and support the Board's conclusion.

[5] There was, moreover, no evidence that Litton's decision was, or had to be, made with any extraordinary speed, flexibility, or secrecy, or that bargaining about the layoff would have impeded any other important business interest recognized by the Court in *First National Maintenance.* 452 U.S. at 682-83. In these circumstances, the benefit to labor-management relations of such bargaining almost certainly outweighed the burden it would have imposed on the conduct of Litton's business.

[6] The Board reasonably concluded that the layoff at issue in this appeal was a mandatory subject of bargaining as an "effect" of the nonbargainable decision to convert from cold-type to exclusively hot-type printing. Accordingly, we will enforce the Board's order to the extent it found Litton's refusal to bargain about the layoff decision to be a violation of sections 8(a)(5) and 8(a)(1), and sought to remedy this unfair labor practice.

In addition to asserting both a "due process"[5] and a "waiver"[6] defense to the charge that its refusal to

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[5] There is no merit in Litton's argument that the Board's finding of a section 8(a)(5) violation under a theory different from the one alleged in the complaint constitutes a denial of due process. The Board found that Litton committed an unfair labor practice "by failing to bargain with the Union over the . . . layoffs as effects of its decision to convert . . . to an exclusively hot-type operation." This conduct was almost precisely the same as the conduct alleged to be unlawful in paragraph 14(b) of the General Counsel's complaint, to wit, "Since . . . October 3, 1980, . . . [Litton] has failed and refused to bargain with the Union . . . with respect to [its] decision to lay off the [ten named] individuals . . . ." Paragraph 15 of the complaint alleged that this conduct constituted a violation of the employer's duty to bargain in good faith under sections 8(a)(5) and (1) of the Act.

The complaint, moreover, was in compliance with the Board's Rules and Regulations, which require "a clear and concise description of the acts which are claimed to constitute unfair labor practices." *See* 29 C.F.R. § 102.15(b). The complaint specified the "act" — a refusal to bargain about the decision to lay off employees — which was claimed, and ultimately found, to be an unfair labor practice.

Finally, as the Board convincingly demonstrates, the theory under which the Board ultimately found a violation of the Act — *i.e.*, that the layoff decision was a mandatory subject of bargaining as a separable effect of the nonbargainable conversion decision — was fully litigated before the Board. The Board properly found that the complaint put Litton on notice of the issues to be litigated, and was more than adequate to satisfy due process requirements.

[6] Litton's argument that the Union, either by contract or conduct, "waived" its right to bargain over the layoffs in this case is meritless. In general, a contractual waiver of the right to bargain about a mandatory subject of bargaining must be in clear and unmistakable language. *American Distributing Co. v. NLRB*, 715 F.2d 446, 450 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984). There is simply no such language in the parties' expired CBA. Contractual silence on the Union's right to bargain about layoffs, moreover, cannot be construed as a waiver. *See NLRB v. Southern California Edison Co.*,

(continued)

bargain over the layoffs violated sections 8(a)(5) and 8(a)(1), Litton argues that it in fact fulfilled any bargaining obligations by offering to discuss "the effects of the layoff." Despite two requests by the Union to meet and discuss *both* the layoffs and their effects, Litton offered in its letter of November 3, 1980, only to bargain over the "effects of the layoffs." The evidence in the record supports the Board's finding that Litton "was not willing to bargain over the layoff as such."

IV

[7] We turn next to the question whether the Board reasonably concluded that an employer's general repudiation of its obligation to arbitrate post-expiration grievances that "arise under" the expired CBA constitutes a violation of sections 8(a)(5). The NLRB has held, in reliance on *Nolde Bros. v. Local No. 358, Bakery & Confectonary Workers Union*, 430 U.S. 243

(ftn. continued)
646 F.2d 1352, 1366 (9th Cir. 1981).

The fact that, on a few occasions in the past, Litton had laid off small numbers of employees without bargaining is also insufficient to show "waiver by inaction." To establish such a defense, Litton was required to show that the Union had clear notice of its intentions sufficiently in advance of any actual layoff to allow a reasonable opportunity to bargain. *American Distributing Co.*, 715 F.2d at 450.

Finally, even if the Union had waived its right to bargain about previous layoffs by not protesting them, it would not have thereby waived its right to bargain about the more extensive layoffs here. *See NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969) (a right once waived is not lost forever; each time the bargainable event occurs the Union has the election of requesting negotiations or not). Whatever the Union might have done with respect to prior layoffs, it unequivocally requested bargaining as to this particular layoff.

(1977),[7] that a general repudiation of a binding contractual obligation to arbitrate grievances arising after expiration of a collective bargaining agreement violates an employer's duty to bargain under secton 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5). *Indiana & Michigan Electric Co.*, 284 NLRB No. 7, 1986-87 NLRB Dec. (CCH) ¶ 18,748 (May 29, 1987).

[8] Under *Indiana & Michigan*, an employer must approach hiatus grievances on an *ad hoc* basis, distinguishing those that are arbitrable under *Nolde* from those that are not. *UPPCO, Inc.*, 288 NLRB No. 98, 1987-88

[7] *Nolde* was an action under "section 301," 29 U.S.C. § 185, to compel an employer to arbitrate a severance pay dispute that arose when, during post-expiration negotiations, the employer informed the union that it was closing its plant in response to the union's strike threat. The Court held that termination of a CBA does not automatically extinguish a party's contractual obligation to arbitrate grievances arising under the contract. 430 U.S. at 250-51. Noting that termination of the CBA "would have little impact on many of the considerations behind [the parties'] decision to resolve their contractual differences through arbitration." 430 U.S. at 254, and that there was a strong presumption of arbitrability of disputes over the meaning and effect of collective-bargaining agreements, the Court concluded:

> "The parties must be deemed to have been conscious of this policy when they agree[d] to resolve their contractual differences through arbitration. Consequently, the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship. In short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication."

430 U.S. at 255.

NLRB Dec. (CCH) ¶ 19,405 (May 12, 1988). Only those grievances that "arise under" the CBA are presumptively arbitrable. *Indiana & Michigan*, 1986-87 NLRB Dec. (CCH) at ¶ 32,054. A dispute based on post-expiration events "arises under" the CBA, under the Board's view, only if it "concerns contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceabie after the contract expires." *Id.*

In this appeal, the Union has launched a broad-based attack on the fundamentals of the Board's *Indiana & Michigan* decision.[8] Basically, the Union contends that

[8] As the Board recognizes, Litton does not challenge the general principles of *Indiana & Michigan*. Litton instead contends that it was not obligated to arbitrate the layoff grievances because of language in the CBA which states that "the stipulations set forth shall be in effect for the time hereinafter specified." Litton argues that, under this general provision, the arbitration clause expired along with the rest of the contractual terms on October 5, 1979. It was clearly reasonable for the Board to conclude that this general expiration clause did not "expressly or by clear implication" negate the strong *Nolde* presumption of post-expiration survival of the contractual obligation to arbitrate. 430 U.S. at 255. Like the Board, the courts have consistently held that general language concerning the duration of the contract is not sufficient to show that the arbitration clause expires with the contract; there must be specific language limiting the arbitrability of post-expiration disputes. *See, e.g., Seafarer's v. National Marine Services, Inc.*, 820 F.2d 148, 154 (5th Cir.), *cert. denied*, 108 S.Ct. 346 (1987); *Local 703, Int'l Bhd. Teamsters v. Kennicott Bros.*, 771 F.2d 300, 303 (7th Cir. 1985); *Steelworkers v. Fort Pitt Steel Casting Division-Conval-Penn, Inc.*, 635 F.2d 1071, 1075-76 (3rd Cir. 1980), *cert. denied*, 451 U.S. 985 (1981).

We also reject Litton's contention that it had no obligation to arbitrate any post-expiration grievances because of the passage of time between the expiration of the CBA and the filing of the layoff grievances. Litton relies on *Kennicott*, 771 F.2d at 303, and dicta in *Chauffeurs, Teamsters and Helpers Local Union 238 v. C.R.S.T.*, (continued)

the Board, in *Indiana v Michigan*, has perpetuated a long-standing error in its analysis of unfair labor practice charges brought to remedy an employer's refusal to arbitrate post-expiration grievances. Rather than relying on section 301 precedent such as *Nolde*, the Union maintains that the Board should be analyzing such charges under the "unilateral change doctrine" of *NLRB v. Katz*, 369 U.S. 736 (1962). *See also Stone Boatyard v. NLRB*, 715 F.2d 441, 444 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981).

In essence, the *Katz* doctrine is that an employer who fails to maintain the status quo with respect to "terms and conditions of employment" after a CBA expires, and imposes unilateral changes in a mandatory subject of bargaining before bargaining to agreement or impasse over the relevant term or condition of employment, commits an unfair labor practice — a refusal to bargain — in violation of section 8(a)(5). Because an arbitration procedure is incontrovertibly a mandatory subject of bargaining, *see Indiana & Michigan*, 1986-87 NLRB Dec. (CCH) at ¶ 32,051, the Union maintains that an employer who unilaterally abandons a pre-existing arbitration procedure during the post-expiration or hiatus period is guilty of a refusal to bargain under *Katz*.

The parties have vigorously debated the soundness of the *Indiana & Michigan* approach to the duty to arbitrate post-expiration grievances. However, because the Board

(ftn. continued)
Inc., 795 F.2d 1400, 1404 (8th Cir.), *cert. denied*, 479 U.S. 1007 (1986), to support this argument. Although the Ninth Circuit has decided a case in which the grievance for which the union sought arbitration occurred nearly a year after the CBA expired, *O'Connor Co. v. Carpenters Local 1408*, 702 F.2d 824 (9th Cir. 1983), in no way did the court indicate that the post-expiration passage of time played any role in its decision to deny arbitration. *See id.* at 825.

erred in concluding that the layoff grievances in this case were not arbitrable, on the ground that they did not "arise under" the expired CBA, we decline the parties' invitation to resolve their dispute over *Indiana & Michigan*. For purposes of this appeal, we assume without deciding that the Board's *Indiana & Michigan* decision is a reasonably defensible construction of the section 8(a)(5) duty to bargain.

V

The Board concluded that the grievances in this case, which alleged unjust layoff in violation of seniority rights, did not "arise under" the collective bargaining agreement. The Board found that the particular grievances at issue in this case did not involve "a right worked for or accumulated over time," and that there was no indication that "the parties contemplated that such rights could ripen or remain enforceable even after the contract expired." The Board, accordingly, declined to order Litton to arbitrate the layoff grievances.

The Board contends that this decision was an exercise of its remedial discretion. We believe, however, that the Board's determination that Litton had no obligation to arbitrate the layoff grievances is a matter of statutory or contractual interpretation, rather than a remedial decision. Therefore, its decision must be upheld if "reasonably defensible," *Ford Motor Co.*, 441 U.S. at 497 (statutory interpretation), or if it is reasonable and not inconsistent with the Act's policies. *NLRB v. Southern California Edison Co.*, 646 F.2d 1352 (9th Cir. 1981) (contract interpretation). We find that the Board's decision was unreasonable and inconsistent both with its own decisions and with the Act's policies as interpreted by this Circuit and the Supreme Court.

The Board and the courts have had considerable difficulty trying to develop a coherent set of principles for determining when a grievance "arises under" the CBA such that an employer has a duty — under *Nolde* for purposes of section 301 actions, and now under *Indiana & Michigan* for purposes of unfair labor practice proceedings — to arbitrate a post-expiration grievance. The Board's current view is that an employer has no obligation to arbitrate a particular grievance based on post-expiration events *unless* it involves contract rights "capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." *Indiana & Michigan*, 1986-87 NLRB Dec. (CCH) at ¶ 32,054.

[9] Somewhat surprisingly, the Board concluded that the grievances in this case, which alleged that Litton laid off ten employees in violation of seniority rights guaranteed by a particular provision in the CBA, did not "arise under" the contract. The Board must have been looking only at the event (the layoff) that sparked the dispute, and not at the substantive contract-based rights (seniority protection against layoff) that were allegedly violated.

[10] Since the Board handed down its Decision and Order in the instant case, it has decided at least two other cases that conflict with its "arising under" conclusion in the instant case. *United Chrome Products, Inc.*, 288 NLRB No. 130, 1987-88 NLRB Dec. (CCH) ¶ 19,436 (May 1, 1988) (dispute arising out of the application of seniority arises under the expired agreement, and is subject to mandatory arbitration, because seniority rights were worked for and accumulated over time and arguably remained enforceable after the contract expired); *UPPCO, Inc.*, 288 NLRB No. 98 (1988) (employer required to arbitrate request concerning

seniority because it arose under the contract and contract did not expressly provide for expiration of the seniority provisions upon expiration of the CBA).[9] Both of these cases mitigate in favor of reversing the Board's decision not to compel Litton to arbitrate the grievances at issue in this case.

[11] There is a further conflict between the Board's standard in *Indiana & Michigan*, and the standard applied in this Circuit in section 301 actions to determine when a grievance "arises under" the expired CBA so as to create a duty to arbitrate. Recently this court rejected an argument that only grievances based on " 'rights undeniably *accruing* under [the] contract *prior to termination*' are covered by the post-termination duty to arbitrate." *Local Jt. Exec. Bd. of Las Vegas Culinary Workers Union, Local 226 v. Royal Center, Inc.*, 796 F.2d 1159, 1163 (9th Cir. 1986) (emphasis in original), *cert. denied*, 479 U.S. 1033 (1987).[10] In *Royal Center*

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[9] In his brief and at oral argument, the General Counsel's representative attempted to distinguish the Board's *UPPCO* and *United Chrome Products* cases saying that the seniority provision at issue in the instant case is not absolute. Rather, he asserted, a Litton employee enjoys seniority protection against layoff only "if other things such as aptitude and ability are equal." This is not a distinction made by the Board, and we do not know whether the Board would impose such a distinction. *See Local Union No. 2338, Int'l Bhd. Electrical Workers v. NLRB*, 499 F.2d 542, 544 (D.C. Cir. 1974) ("reasons for Board action are to be supplied by the Board, and not by counsel as its surrogate"); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 87-89 (1943); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

In the absence of a Board decision explaining why consideration of "aptitude and ability" prevent arbitrability, we refuse to make such a distinction.

[10] The *Royal Center* court also observed, in passing, that the Supreme Court has referred to arbitration a dispute over contractual seniority rights. *See Piano & Musical Instrument Workers, Local* (continued)

we construed much more expansively the *Nolde* presumption of arbitrability of post-expiration grievances; rather than focusing on a narrow concept such as "accrual," the court centered its analysis on *"preserving the original intent of the parties"* as to whether a particular type of grievance would have been arbitrable if circumstances unanticipated by the parties when the agreement was drafted had not arisen. 796 F.2d at 1163 (emphasis in original).

The *Royal Center* approach is consistent with that of other Ninth Circuit cases. *See George Day Construction Co. v. United Bhd. of Carpenters and Joiners of America, Local 354*, 722 F.2d 1471, 1478 (9th Cir. 1984) (observing, in dicta, that post-expiration grievances are arbitrable if union can point clearly to a contractual provision that it claims was violated by the employer); *O'Connor v. Carpenters Local Union No. 1408*, 702 F.2d 824, 825 (9th Cir. 1983) (employer had no duty to arbitrate post-termination grievance because parties had not agreed that it would be subject to arbitration after expiration of the CBA, and because the dispute "was not covered by [the] contract").

The *Royal Center* analysis is also consistent with that of *Nolde* itself. In *Nolde*, the Supreme Court did not directly rely on the accruability of the right asserted in concluding that the severance pay grievance at issue in that case was arbitrable. Instead, the Court viewed the grievance as "arising under" the expired contract because it "hinge[d] on the interpretation ultimately given the contract clause." 430 U.S. at 249. Indeed, the *Nolde* Court held that "where the dispute is *over a provision of the expired agreement*, the presumptions favoring

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(ftn. continued)
2549 v. W.W. Kimball Co., 333 F.2d 761 (7th Cir.), *rev'd per curiam*, 379 U.S. 357 (1964).

arbitrability must be negated expressly or by clear implication." *Id.* at 255 (emphasis added).

[12] Because of the conflicts within the Board's own cases in applying its test for determining when a post-expiration grievance "arises under" the CBA so as to give rise to a duty to arbitrate, and between the Board and Ninth Circuit precedent on the same issue, we hold that the Board's conclusion that the layoff grievance in this case did not "arise under" the CBA is unreasonable and must be reversed.

VI

The Board reasonably concluded that the layoff was a mandatory subject of bargaining and that Litton, therefore, violated sections 8(a)(5) and 8(a)(1) by refusing to bargain about the layoff decision. To this extent, the Board's order will be ENFORCED.

The Board's conclusion that Litton had neither a statutory nor a contractual obligation to arbitrate post-expiration grievances alleging unjust layoffs "out of seniority," however, is inconsistent with Supreme Court, Ninth Circuit, and its own recent case law. Accordingly, the portion of the Board's order by which it declined to order arbitration of the layoff grievances is REVERSED, and the cause REMANDED for further proceedings in accordance with this opinion.

APPENDIX B

286 NLRB No. 79

DBS
D-4832
Santa Clara, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 32-CA-3160

LITTON FINANCIAL PRINTING DIVISION,
A DIVISION OF LITTON BUSINESS
SYSTEMS, INC.

and

PRINTING SPECIALTIES AND PAPER
PRODUCTS UNION, DISTRICT COUNCIL
NO. 1, INTERNATIONAL PRINTING AND
GRAPHIC COMMUNICATIONS UNION

DECISION AND ORDER

On 4 September 1981 Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed cross-exceptions and supporting briefs,[1] and the Respondent filed an answering brief.

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[1] On the following dates the Board received letters from counsel for the parties calling the Board's attention to various cases: 9 August 1982 (the Charging Party); 8 November 1982 (the Charging Party); 18 July 1983 (the Respondent); 7 January 1986 (the Respondent). The Respondent has requested that the letter received 9 August 1982 from counsel for the Charging Party be stricken from the record. This request is denied.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[3]

The judge concluded that the Respondent did not violate Section 8(a)(5) and (1) of the Act by failing to bargain over a decision to lay off certain employees in August and September 1980 without bargaining with the Union. We reverse this dismissal for the reasons set forth below. The judge did find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to process pursuant to the grievance and arbitration procedure set forth in its expired collective-bargaining agreement certain employee grievanes filed over the layoff. We agree with the judge that the Respondent's conduct in failing and refusing to process the grievances violated Section 8(a)(5), but we do so for the following reasons.[4]

The Respondent and the Union were parties to collective-bargaining agreements covering the produc-

[2] The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Charging Party has excepted to the judge's refusal to award attorney's fees. We conclude that the defenses that the Respondent has raised are debatable rather than frivolous, and we find that an award of such expenses is unwarranted. *Heck's Inc.*, 215 NLRB 765 (1974); *Tiidee Products*, 194 NLRB 1234 (1972).

[4] The judge also found that the Respondent violated Sec. 8(a)(5) and (1) of the Act by dealing directly with employees by granting severance pay benefits to laid-off employees without prior notice to or consultation with the Union. The parties have not excepted to this finding.

tion and maintenance employees at the Respondent's facility in Santa Clara, California, since 1974. At the time of the events recounted here, the parties were operating without a contract, their last agreement having expired on 5 October 1979. That expired contract required the parties to arbitrate "differences that may arise between the parties hereto regarding this Agreement and any violation of the Agreement, and the construction to be placed on any clause or clauses of the Agreement." Moreover, that contract's introductory section specified that the "stipulations set forth shall be in effect for the time hereinafter specified." Prior to August, 1980,[5] the Santa Clara plant was the only one of the Respondent's facilities at which both cold- and hot-type printing processes were employed, all of its other plants using only the hot-type process. In July the Respondent decided to discontinue its cold-type printing process and to convert the Santa Clara plant to an entirely hot-type operation. Four factors motivated the Respondent's decision: dissatisfaction with the cold-type process' product and a consequent loss of orders, including the loss of 30 percent of the cold-type business of one of its largest customers; the greater economy of the hot-type format; the expectation that in an emergency the Respondent's other hot-type plants would be able to do the Santa Clara plant's work; and the expectation that a strictly hot-type operation would reduce training and equipment costs. Pursuant to this decision, the Respondent transferred cold-type work to its other plants and began to acquire additional hot-type equipment and to sell its cold-type equipment. On 29 August and 2 September the Respondent laid off 10 of the plant's 42 unit employees, 7 of whom had worked exclusively on the cold-type equipment and 3 of whom

[5] Unless otherwise noted, all dates refer to 1980.

had worked primarily on it. Although the expired agreement required the Respondent to afford the Union certain notice of layoffs and provided that "in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal," the Union received no advance notice of the layoffs and the employees were not laid off in accord with their seniority.

The affected employees notified the Union of the layoffs, whereupon individual grievances were filed for each laid-off employee under the expired agreement, charging "unjust layoff . . . out of seniority." Union Business Agent Marilyn Major testified that the Respondent refused to accept the grievances. On 24 September Major wrote the Respondent's plant manager, Mary Arnold, that the grievances had been filed and requested both a meeting with the Respondent "to discuss this layoff and its impact on these senior people" and reinstatement of the laid-off employees pending resolution of the matter. As the judge found, the Respondent admitted that it failed and refused, and continues to fail and refuse, to process the employee grievances pursuant to the grievance and arbitration procedure in the expired contract. On 3 November the Respondent's counsel reiterated to Major in pertinent part:

> Your letter of September 24 . . . appears to me to be ambiguous. When I first replied to it on October 3, I viewed it as a request to utilize the grievance-arbitration provisions of the expired contract.
>
> Upon reading it again, I can see where you might have also been requesting a meeting to discuss the effects of the layoffs mentioned in your letter. If that was your intent, I have no objection to such a meeting. Please call me if you wanted to arrange such a discussion.

On 10 November the Union's attorney renewed its request for bargaining over both the decision to lay off the employees and the effects. Since then, the Respondent, although expressing its willingness to bargain over the "effects" of the layoffs, has refused to bargain over the "decision" to lay off the employees, and the parties have not bargained over either subject.

1. As noted above, the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to process the layoff grievances pursuant to the grievance-arbitration clause in the expired collective-bargaining agreement. Board law has long held that the unilateral abandonment of a contractual grievance procedure upon expiration of the contract violates Section 8(a)(5) of the Act. See, e.g., *Bethlehem Steel Co.*, 136 NLRB 1500, 1503 (1962), enfd. in pertinent part 320 F.2d 615 (3d Cir. 1963). Therefore, the Respondent was obligated to continue to process grievances during the hiatus period under its expired agreement, and we find that by failing and refusing to accept the layoff grievances, the Respondent violated Section 8(a)(5) of the Act.

In the recently decided *Indiana & Michigan Electric Co.*, 284 NLRB No. 7 (May 29, 1987), we reaffirmed our conclusion in *Hilton-Davis Chemical Co.*, 185 NLRB 241 (1970), that "the arbitration commitment arises solely from mutual consent and that Congress did not intend the National Labor Relations Act to operate to create a statutory duty to arbitrate." *Indiana & Michigan Electric*, supra, 284 NLRB No. 7, slip op. at 13. Instead, we concluded that if a party to a collective-bargaining agreement retains a legally enforceable obligation to arbitrate grievances originating after

expiration, that obligation must originate in the expired agreement. Id., slip op. at 17-18. In *Indiana & Michigan Electric* we found that the expired contract in that case contained a broad arbitration clause, without language sufficient to overcome the presumption that the obligation to arbitrate imposed by the contract extended to disputes arising under the contract and occurring after the contract had expired. Thus, the respondent remained "subject to a potentially viable contractual commitment to arbitrate even after the contracts expired," id. at 19, a commitment that it repudiated in violation of Section 8(a)(5) of the Act by an across-the-board written policy expressing a general intention not to process any grievances and routine refusals to process grievances or arbitrate postexpiration disputes.

In the case at hand, we find that the language of the collective-bargaining agreement subjected the Respondent to the same "potentially viable contractual commitment to arbitrate" postexpiration grievances. First, the expired agreement imposes a broad arbitration requirement on the parties. Second, the judge correctly found that the language of the expired agreement does not negate "expressly or by clear implication" the presumptions favoring the arbitration of grievances arising under the expired contract but occurring after it expired. *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243, 255 (1977). The language quoted above, giving the contract's stipulations effect for "the time herein specified," is not sufficient to rebut the *Nolde* presumption of arbitrability because it does not reveal the parties' intentions "as to the pertinent issue, which is, whether the arbitration clause *survives* expiration and, if so, which post-contract grievances are arbitrable." *Teamsters Local 703 v. Kennicott Bros. Co.*, 771 F.2d 300, 303 (7th Cir. 1985) (emphasis in original). In *Indiana & Michigan Electric* itself, relying on parallel

contractual language in *Nolde*, we found that the *Nolde* presumption was not rebutted by a termination clause which read: "In the event of termination of this agreement as herein provided, it shall cease to have binding effect, and the terms and conditions herein may be altered, modified, or terminated without notice." 284 NLRB No. 7, slip op. at 19, fn. 5.

Moreover, we find that, like the respondent in *Indiana & Michigan Electric*, the Respondent, by the course of conduct described above, repudiated its contractual obligation to arbitrate by its refusal to arbitrate the grievances presented to it by the Union. As noted above, the Respondent has admitted that it failed and refused to process the 10 grievances discussed here "pursuant to the grievance and arbitration procedure in the *expired* contract" (emphasis added). In view of this admission and its 3 November letter to Major, noted above, we conclude that the Respondent's conduct "amounted to a wholesale repudiation of its contractual obligation to arbitrate." *Indiana & Michigan Electric*, supra, slip op. at 20 (citations omitted). In concluding that the Respondent's conduct fell short of a repudiation of its contractual obligation to arbitrate, our dissenting colleague fails to note the Respondent's admission and the clear implication of its 3 November letter. He also cites *Dallas Morning News*, 285 NLRB No. 106 (Sept. 16, 1987), in concluding that the Respondent's course of conduct did not establish a "wholesale repudiation" of the arbitration procedure. We find *Dallas Morning News* factually distinguishable from the instant case. In *Dallas Morning News*, the union wrote the Federal Mediation and Conciliation Service requesting it to appoint a panel of arbitrators to resolve a grievance over the layoff of two employees. After receiving a copy of this letter, the respondent's agent replied to the union, "I believe there is no basis for your letter requesting a panel of

arbitrators, and I consider it to be of no force or effect as far as The News is concerned." The Board found the evidence "ambiguous insofar as the issue of an undifferentiated blanket refusal is concerned." It found that the respondent's letter did not identify reasons for its "no basis" assertion, and did not refer to grievance or arbitration requests other than the union's letter. The Board also referenced the respondent's brief to the judge and the argument made there, which it apparently concluded did not raise a wholesale repudiation argument, and found that the evidence concerning the respondent's original reply was not inconsistent with the position in its brief. It thus concluded that it could not "say that a preponderance of the record evidence weighs in favor of finding the kind of wholesale repudiation of the arbitration procedure" that was found in *Indiana & Michigan Electric*. Id., slip op. at 3. By contrast, here, the Respondent's admission, the language of its 3 November letter, and also its brief to the Board (which argues, e.g., that the parties' contract establishes that "the parties clearly indicated that they did not intend the arbitration provision to survive the term of the contract") are all consistent with a conclusion that the Respondent's refusal to process the grievances through the grievance-arbitration procedure amounted to a "wholesale repudiation" under *Indiana & Michigan Electric*. We also note that in *Indiana & Michigan Electric*, as here, none of the individual grievances at issue were found to "arise under" the expired contract within the meaning of *Nolde*. Therefore, contrary to the implication of the dissent, the Board's ultimate determination of arbitrability for remedial purposes does not defeat the finding of a violation where the respondent's generalized refusal to arbitrate is based on the expiration of the contract rather than the arbitrability of specific grievances. Accordingly, we find that the Respondent violated Section

8(a)(5) and (1) of the Act.[6]

2. The General Counsel and the Union have excepted to the judge's dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain over the decision to lay off the 10 unit employees. The judge found that the decision was "inextricably intertwined" with the decision to convert the plant's machinery, which he found was not a mandatory subject of bargaining under *First National Maintenance v. NLRB*, 452 U.S. 666 (1981). While the General Counsel does not contend that the decision to convert the plant's machinery was a mandatory subject of bargaining, she does contend that the layoffs were subject to mandatory bargaining as an effect of the decision to convert the plant's machinery. We find merit in this exception under the facts of this case. Both *First National Maintenance*, supra, and *Otis Elevator Co.*, 269 NLRB 891 (1984), reaffirm that employers are obligated to bargain over the effects on unit employees of management decisions that are not themselves subject to the obligation to bargain. Under the facts of this case, it is clear that the Respondent's decision to lay off employees is not so inextricably intertwined with the conversion decision as to render impossible bargaining over the layoff decision, as distinct from the conversion decision,

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[6] The Respondent also appears to argue that the grievances involved in this case are not arbitrable because the layoffs occurred nearly 1 year after the contract expired. Compare *Nolde*, supra, 430 U.S. at 255 fn. 8; *Teamsters Local 238 v. C.R.S.T.*, 795 F.2d 1400, 1404 (8th Cir. 1986); *Teamsters Local 703 v. Kennicott Bros.*, supra, 771 F.2d 300, 303. In view of our finding here that the grievances did not arise under the expired collective-bargaining agreement, we find it unnecessary to determine whether time alone, without reference to the nature of the grievance, is sufficient to overcome the presumption of arbitrability.

as the judge believed it to be. In concluding otherwise, the judge stated that:

> It is not mere speculation that the Union's arguments against, and suggestions in place of, layoffs would be countered by Respondent's insistence that such action was necessary and that any alternative would not be cost effective. These arguments would undoubtedly, despite the Union's protestations to the contrary, call into question the rationale underlying the plant conversion plan itself.

JD sec. III, B, 3.

We disagree with the judge that the course of bargaining would inevitably lead to questioning the decision to convert the plant. Laying off 10 employees is not the inevitable or, as our dissenting colleague would have it, the "natural" outcome of the conversion decision. It is one of a number of responses to changed circumstances, e.g., the 10 employees could have been retrained to work the hot-type equipment or transfered [*sic*] to other plants or positions within the Santa Clara plant. Moreover, 3 of the 10 employees laid off had not worked exclusively on the cold-type machinery; surely their layoff was not an inevitable or a "natural" consequence of the decision to convert the plant's operations. Plainly, then, the judge's forecast of fruitless negotiations will not support a finding that the layoff and conversion decision were inseparable for bargaining purposes.

The nature of the layoff in this case was as the General Counsel contends: it was an effect of the conversion decision and, accordingly, the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union over it. *Morco*

Industries, 279 NLRB No. 100, slip op. at 4 (Apr. 30, 1986). Although the Respondent was willing to bargain over the effects of the layoff, it was not willing to bargain over the layoff as such. We emphasize that the Respondent has not excepted to the judge's finding that it failed and refused to bargain over the decision to lay off.[7]

Our dissenting colleague contends that "regardless of whether the layoff decision is characterized as 'decision' bargaining or 'effects' bargaining, it is subject to the proscriptions of Section 8(a)(5) only if it is a mandatory subject of bargaining" He then directs us back, inter alia, to the plurality opinion in *Otis Elevator*, supra, and maintains that because the layoff was motivated solely by the lawful decision to convert operations and not motivated by a desire to reduce labor costs it was non-mandatory subject of bargaining. This is a unique view of the plurality *Otis Elevator* opinion, which itself indicated that it was addressed to analyzing "Section 8(d) as it impacts upon management decisions, other than partial closings, to change the nature of the enterprise." 269 NLRB at 893. The plurality opinion nowhere indicated that it was also addressed to the *effects* of such management decisions. Indeed the plurality opinion in *Otis* remanded the effects bargaining allegations in that case for further analysis. It did not simply dismiss those allegations as outgrowths of the

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[7] Although the complaint alleges a failure to bargain over the decision to lay off employees, the General Counsel and Charging Party clearly argued effects bargaining in their exceptions and brief in support of exceptions and the Respondent filed a reply brief. The Respondent does not contend that it was not put on notice of the issues presented or that any additional evidence would have been relevant to the effects bargaining issue. Consequently, we find that this pre-*Otis Elevator*, supra, complaint was more than adequate to satisfy due process requirements.

larger nonbargainable decision to transfer work. In fact, not one of the views expressed in *Otis* would apply its analysis to effects bargaining. Member Dennis concurred in remanding the effects bargaining violation, while Member Zimmerman would have allowed the finding of an effects bargaining violation to stand without further hearing. Id. at 895, 901. Here, we find the layoff was an *effect* of the decision to convert and hence was bargainable on that basis. More importantly, we also note that the continuation or termination of employment is certainly a term or condition of employment, *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 210 (1964), so that the subject matter of the decision at issue here — the layoff of the 10 employees — falls within the limits dictated by Section 8(a)(5) of the Act. It is therefore appropriate to order bargaining over the layoff decision in this case.

Our colleague further charges that our decision ignores the Supreme Court's mandate in *First National Maintenance*, supra, that management's "need for unencumbered decisionmaking" must not be denied by undue bargaining constraints. He thereby ignores other remarks of the Court in *First National Maintenance*. By placing this limit on "decision-bargaining," the Court was not by extension limiting bargaining on the "impact" or effects of such a decision on the employees, as its underscoring of the continued viability of effects bargaining demonstrates. 452 U.S. at 677 fn. 15. Here we are finding the layoff bargainable as an effect of the conversion decision.[8]

[8] A brief description of what bargaining over the layoffs would likely entail may help to clarify our reason for rejecting our dissenting colleague's view that requiring such bargaining impermissibly encumbers the entrepreneurial decision to eliminate jobs for technological reasons. The likely scope of such bargaining is illuminated by the submissions of both the Respondent and the Union in

(continued)

In this case, as in *Morco*, bargaining over the layoffs as an effect of the business decision will not compromise the employer's interest in "unencumbered decision making," *First National Maintenance*, supra at 679, which the Supreme Court in *First National Maintenance* and the Board in *Otis Elevator*, supra, sought to protect. Our dissenting colleague disputes our reliance on *Morco*, but his analysis of the case is in error. In *Morco*,

the respondent transferred work from its plant in Las Pinellas, Florida, to a new plant in Mississippi to facilitate the performance of more sophisticated work by its unionized employees at Las Pinellas. When the contract that was to have generated the more sophisticated work was delayed, the respondent commenced layoffs at

(ftn. continued)
this case.

The Union, in its brief, agrees that it had no right to bargain over the decision to make a technological change that would eliminate certain types of unit work, but it submits that it should have had a right to bargain, for example, over the timing of any attendant layoffs, the order in which employees should be laid off, the possibilities of avoiding the necessity of some or all of the layoffs by retraining senior employees who had performed the eliminated work so that they could take other available jobs, or by going to a short workweek or a system of rotating layoffs that would divide the remaining amount of work among the work force.

The Respondent counters in its brief that the Union had the opportunity to bargain about retraining workers, transferring them to other plants, or changing to a system of rotating layoffs. In fact it now submits that it offered the Union the opportunity to engage in such bargaining when it offered to bargain over the "effects" (but not the decision) to lay employees off. We do not think that the Respondent's offer to bargain about the "effects" of layoffs gave the Union notice that the Respondent was willing to bargain about whether layoffs could be *avoided* through transfer, retraining, or the like. Thus whether or not the Respondent was willing then to engage in the scope of bargaining it now describes is immaterial to our conclusion that the Respondent did not make the offer to bargain that it was required to under our Act.

the Las Pinellas plant and refused to bargain over them. The Board ruled that the respondent had no duty to bargain over the decision to transfer the work but specifically held that it was obligated "to bargain with the Union about the *effects of [the] decision . . . including the layoffs*." 279 NLRB No. 100 slip op. at 4 (emphasis added). Moreover, in addition to its explicit characterization of the layoff as an effect of the decision to transfer work, the Board also expressly adopted the judge's conclusion that the respondent had violated Section 8(a)(5) by refusing to bargain over the "effects (including the layoffs)" of the respondent's decision to transfer work. Id., ALJD slip op. at 14. Thus, the plain language of *Morco* indicates that our colleague is in error in averring that the Board's order in *Morco* goes only to the *effects* of the layoff rather than to the layoff itself as an effect of the decision to transfer work out of the bargaining unit.

In *Drummond Coal Co.*, 277 NLRB 1618 (1986), the Board found that the respondent had no obligation to bargain over its decision to close its central repair shop, transfer the work, and lay of the employees. It does not appear that the legal theory before us here — that the layoff of the Respondent's employees was an effect of a nonbargainable management decision and thus was subject to an effects bargaining obligation — was before the Board in *Drummond*. In this case, the General Counsel conceded that the business decision resulting in the layoff was nonbargainable and sought to have the layoff considered separately as an *effect* of that nonbargainable decision. On examination of this issue, we find that the approach urged by the General Counsel in *Morco* is a better treatment of the issue of the Respondent's obligation to bargain over the layoffs that resulted from its decision to convert its plant's operations.

We further find no merit in the Respondent's contention, which the judge found it unnecessary to reach, that the Union waived its right to bargaining over the layoff, whether by failing to request bargaining, by contractual waiver, or by prior practice. The record shows that the Union repeatedly requested bargaining over the layoff decision and that the Respondent refused to bargain over it. Nothing in the collective-bargaining agreement expressly waives the Union's right to bargain over the layoff decision, and the provision for notice to the Union of contemplated layoff does not provide a basis for an implied waiver. Section 12(a) of the collective-bargaining agreement provides, in part: "[w]henever an Employer intends to lay off all or part of his employees, he shall give notice of such intention not later than quitting time of the previous working day." It is clear that this provision, although requiring notice of a decision to lay off, is silent as to the Union's right to bargain over such a decision. We also reject, as did the judge, the Respondent's contention that Business Agent Major's interpretation of the meaning of this provision is an admission. As Major had no knowledge what the parties intended by the provision, her testimony about its meaning is mere opinion. Finally, the record does not establish that the Respondent previously laid off employees without consulting or bargaining with the Union, or that the Union acquiesced in such acts.

Remedy

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to take certain affirmative action, and to post the appropriate notice. We shall remedy the Respondent's unilateral abandonment of its grievance procedure by ordering it to process the grievances through its

contractual grievance procedure. In accord with our analysis in *Indiana & Michigan Electric*, supra, slip op. at 20-22, however, we will remedy a repudiation of the contractual commitment to arbitrate by ordering arbitration of the grievances only when the grievances at issue "arise under" the expired contract. *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977).

The grievances at hand rely on the contractual provisions governing the order of layoff. As in *Indiana & Michigan Electric*, we conclude that the right invoked by the grievances does not "arise under" the expired contract under *Nolde*. The conduct that triggered the grievances — the layoff of the 10 employees — occurred after the contract had expired. The right to layoff by seniority if other factors such as ability and experience are equal is not "a right worked for or accumulated over time." *Indiana & Michigan*, supra, slip op. at 23. And, as in *Indiana & Michigan Electric*, there is no indication here that "the parties contemplated that such rights could ripen or remain enforceable even after the contract expired." Id. (citation omitted). Therefore, the Respondent had no contractual obligation to arbitrate the grievances and we shall not order the arbitration of the grievances.[9]

Having found that the Respondent, by failing to bargain with the Union over the 31 August and 2 September layoffs as effects of its decision to convert its Santa Clara, California plant to an exclusively hot-type operation, has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall accompany our order to bargain with a limited

[9] Whether the conduct grieved in the layoff grievances constituted an unlawful unilateral change in terms and conditions of employment is not before us. The manner of the layoff was not alleged as a unilateral change.

backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so in this case by requiring the Respondent to pay backpay to its employees in a manner analogous to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), and *Interstate Tool Co.*, 177 NLRB 686 (1969). Thus, the Respondent shall pay all affected employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the layoffs of 31 August and September 1980 as effects of the plant conversion on its employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision and Order or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount he would have earned as wages from the dates on which he was laid off or terminated to the time he was recalled or secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.

ORDER

The National Labor Relations Board orders that the Respondent, Litton Financial Printing Division, a Division of Litton Business Systems, Inc., Santa Clara, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Without prior notice to or consultation with Printing Specialties and Paper Products Union, District Council No. 1, International Printing and Graphic Communications Union, as the exclusive collective-bargaining representative of the employees in the appropriate unit, dealing directly with the employees by granting severance pay benefits to employees who have been laid off.

(b) Refusing to bargain collectively, within the meaning of the Act, with the Union by unilaterally repudiating the arbitration provisions of the parties' 1974-1977 collective-bargaining agreement (the 1974-1977 Agreement) after the agreement expired.

(c) Refusing to bargain collectively with the Union by unilaterally abandoning the grievance procedure in the 1974-1977 Agreement after the agreement expired.

(d) Refusing to bargain collectively, within the meaning of the Act, with the Union over its layoffs of 31 August and 2 September 1980 as effects on its employees in the unit of its decision to convert its Santa Clara plant to a hot-type plant.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On the Union's request, process the 10 layoff grievances filed by the Union about 5 September 1980 pursuant to the grievance procedure established in the 1974-1977 Agreement.

(b) On the Union's request, bargain with it over its layoffs of 31 August and 2 September 1980 as effects on its employees in the unit of the decision to convert the Santa Clara, California plant to a hot-type plant.

(c) Pay the laid-off employees their normal wages for the period set forth in the remedy portion of the Decision and Order.

(d) Post at its facility in Santa Clara, California, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[10] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. 6 November 1987

Marshall B. Babson, Member

James M. Stephens, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN DOTSON, dissenting.

I dissent from my colleagues' finding that the Respondent violated Section 8(a)(5) and (1) of the Act by abandoning the arbitration procedure of the expired contract and by refusing to bargin with the Union over the "effects" of its decision to convert the plant's machinery.

The facts are not in dispute. Briefly stated, the Union has represented the Respondent's production and maintenance employees since 1974, and the Respondent and the Union were parties to successive collective-bargaining agreements, the last of which expired on 5 October 1979. In July 1980 the Respondent decided to discontinue its cold-type printing process at its Santa Clara plant and convert a strictly hot-type process. As a result, the Respondent transferred its cold-type work to other plants, sold its cold-type equipment, and laid off 10 employees. Of these 10 employees, 7 had worked exclusively on the cold-type equipment and 3 had worked primarily on it. The Respondent failed to give the Union notice of the layoffs, nor did it choose the employees for layoff in accord with seniority.[1]

The Union filed grievances on behalf of each of the laid-off employees alleging "unjust layoff, out of seniority," and the Respondent refused to accept them. On 24 September Union Business Agent Marilyn Major sent the Respondent's plant manager, Mary Arnold, a

[1] The expired contract contained a provision which stated:

> Whenever an Employer intends to layoff all or part of his employees, he shall give notice of such intention not later than quitting time of the previous working day. It is also understood that in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal.

letter requesting "that the Company meet with our representatives to discuss this layoff and its impact on these senior people." By letter dated 3 November, the Respondent's attorney responded:

> In going through some old mail today, I came across your letter of September 24 and read it again. It appears to me to be ambiguous. When I first replied to it on October 3, I viewed it as a request to utilize the grievance-arbitration provisions of the expired contract.
>
> Upon reading it again, I can see where you might have also been requesting a meeting to discuss the effects of the layoffs mentioned in your letter. If that was your intent, I have no objection to such a meeting. Please call me if you wanted to arrange such a discussion.

It is undisputed that the Respondent continued to refuse to bargain over the layoff decision but expressed willingness to bargain over the effects of that decision; that the Union never requested to meet with the Respondent to discuss the effects of the layoff decision; and that the Respondent refused to process the 10 layoff grievances.

My colleagues conclude on these facts that the Respondent's conduct "amounted to a wholesale repudiation of its contractual obligation to arbitrate," citing *Indiana & Michigan Electric Co.*, 284 NLRB No. 7, slip op. at 20 (May 29, 1987). I disagree. Although I joined my colleagues in that portion of the decision cited, the facts on which we based our finding of a wholesale repudiation of the arbitration provisions are far different from those in the present case. In *Indiana*

& Michigan, slip op. at 19-20, as Members Babson and Stephens stated:

> [T]he Respondent took the position that upon contract expiration it was no longer bound by the arbitration provisions. The Respondent followed through or its initial declaration that it would not apply the arbitration provisions during the contractual hiatus by routinely refusing to arbitrate any hiatus grievance. It expressly grounded its refusal to arbitrate in each case on its general intention not to arbitrate any grievances arising while the parties were without a contract. The Respondent did not limit its refusal to arbitrate to a particular grievance or class of grievances.

Such is not the case here. All the record indicates is that the Union presented 10 grievances to the Respondent, all of which arose outside the expired contract, and the Respondent refused to process them. The Union never mentioned the issue of arbitrating these or any other grievances, and the Respondent, unlike in *Indiana & Michigan*, never expressly or implicitly rejected the idea of arbitrating any grievances, except possibly the 10 grievances involved here, which my colleagues agree the Respondent was under no duty to arbitrate. Under these circumstances, I find the evidence insufficient to establish a "wholesale repudiation" of the arbitration procedure.[2] See *Dallas Morning News*, 285 NLRB No.

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[2] My colleagues base their finding of wholesale repudiation on the Respondent's 3 November letter to the Union and its admission at the hearing that it failed and refused to process the 10 grievances "pursuant to the grievance-arbitration procedure in the expired

(continued)

106 (Sept. 16, 1987). Further, for the reasons stated in my partial dissent in *Indiana & Michigan*, I would hold that the postexpiration duty to follow the contractual grievance procedure exists only to the extent of the duty to arbitrate grievances "arising under" the contract. As these grievances did not "arise under" the contract, I would find that the Respondent had no obligation so to process them. Accordingly, I would dismiss these complaint allegations.

My colleagues also find that the Respondent had an obligation to bargain with the Union over its decision to lay off the 10 cold-type employees. They achieve this result by characterizing the layoff as an "effect" of the decision to convert from cold-type to hot-type printing and, as such, encompassed within the Respondent's bargaining obligation.

I take no issue with my colleagues over the well-settled proposition that an employer must engage in effects bargaining. What I do take issue with them is that, under all the circumstances presented in this case, the layoff may not properly be classified as an effect of the conversion decision. The General Counsel did not allege, nor do my colleagues find, that the Respondent had any obligation to bargain with the Union over its decision to convert from cold-type to hot-type printing.[3] Nevertheless, the General Counsel and my colleagues view the layoff decision as a separate and distinct decision from the conversion decision, thereby triggering the Respondent's obligation to bargain.

(ftn. continued)
contract." Contrary to my colleagues' assertion, these two pieces of evidence establish only that the Respondent refused to process these grievances, not an across-the-board refusal to arbitrate the post-expiration disputes.

[3] Under *Otis Elevator*, 269 NLRB 891 (1984), the Respondent's conversion decision is clearly a nonmandatory subject of bargaining.

Such a distinction is strained in light of the facts of this case. Once the Respondent decided to convert from cold-type to hot-type printing, it laid off the 10 employees involved exclusively or primarily with the cold-type process. Thus, the Respondent's layoff decision was totally dependent on and a natural result of its conversion decision or, as the judge found, the layoff decision was "inextricably intertwined" with the conversion decision. Once the General Counsel in effect conceded that the Respondent could lawfully implement the conversion decision without bargaining with the Union, it follows that the Respondent could lawfully lay off the cold-type employees — the natural and logical method of implementation of its conversion decision.

Even assuming, however, that my colleagues are correct in stating that "the Respondent's decision to lay off employees is not so inextricably intertwined with the conversion decision to render impossible bargaining over the layoff decision, as distinct from the conversion decision, as the judge believed it would be," their refusal to analyze the layoff decision under *Otis Elevator* is erroneous.

It is axiomatic that an employer's duty to bargain encompasses only mandatory subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Regardless of whether the layoff decision is characterized as "decision" bargaining or "effects" bargaining, it is subject to the proscriptions of Section 8(a)(5) only if it is a mandatory subject of bargaining. Thus, as a prerequisite to any order that the Respondent must bargain with the Union over the layoff decision, my colleagues must find the layoff decision to be a mandatory subject of bargaining.

This they cannot do. Under the opinion of former Member Hunter and me in *Otis Elevator*, the layoff

decision, motivated solely by the Respondent's decision to implement its lawful conversion decision and not by labor cost reasons, is a nonmandatory subject of bargaining. No different result would be reached under the opinions of former Members Zimmerman and Dennis as the decision was not amenable to resolution through bargaining.[4]

Because the meaning of my colleagues' order is far from certain in this case, they may contend that the Respondent is required to bargain only over the effects of its layoff decision. Yet under the facts of this case, my colleagues are precluded from entering such an order. The General Counsel did not allege that the Respondent failed to bargain over the effects of the layoff decision. Nor could one be sustained in light of the Respondent's stated willingness to engage in effects bargaining, and the Union's failure to respond to such offers.

The effects of my colleagues' decision in this case is to order the Respondent to bargain over a subject that it has no legal obligation to do. My colleagues have not expounded a legal basis for their decision nor, in my opinion, is it possible to do so.[5] As the Supreme Court

[4] My colleagues contend that *Otis Elevator* is irrelevant here because *Otis* does not apply to effects bargaining. As I explained above, in my opinion the layoff decision here cannot be classified merely as an effect of the conversion decision but rather must be analyzed, like other management decisions, under the framework set out in *Otis*.

[5] In support of their finding, my colleagues rely on *Morco Industries*, 279 NLRB No. 100 (Apr. 30, 1986), a case in which I participated. In my opinion, the Board in that case ordered the respondent to bargain only about the effects of the layoff which resulted from the lawful transfer decision, not the layoff decision itself. This interpretation is consistent with the remedy given in that case as well as with the Board's decision in *Drummond Coal Co.*,

(continued)

recognized in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), and in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), certain management decisions may result in the loss of jobs and yet be outside the bargaining obligation. Indeed, as the Court stated in *First National Maintenance*, 452 U.S. at 678-679:

> Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. . . . [I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business. [Footnotes omitted.]

My colleagues have ignored these dictates. To require the Respondent to bargain over the layoff, which was part and parcel of its decision to convert its machinery, would severely undermine the Respondent's "need for unencumbered decisionmaking." This is true

(ftn. continued)
277 NLRB 1618 (1986), in which I also participated, where the Board found no obligation to bargain over the decision to lay off employees as a result of its lawful decision to transfer repair services and close the Jasper shop and deferred the issue of effects bargaining over the layoffs to an arbitral award.

regardless of whether the layoff is considered as an "effect" of the conversion decision or a decision to be viewed separately from the conversion decision.

For these reasons, I dissent.

Dated, Washington, D.C. 6 November 1987

Donald L. Dotson, Chairman

NATIONAL LABOR
RELATIONS BOARD

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, PRINTING SPECIALTIES DISTRICT COUNCIL NUMBER 2, as successor to Printing Specialties District Council Number 1, Petitioner-Intervenor, v. LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC., Respondent.	No. 88-7065 NLRB No. 32-CA-3160

PRINTING SPECIALTIES DISTRICT COUNCIL NUMBER 2, as successor to Printing Specialties District Council Number 1, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 88-7079 NLRB No. 32-CA-3160 JUDGMENT

Upon Application For Enforcement of an Order
of the National Labor Relations Board

This Cause came on to be heard on the Transcript of the Record from the National Labor Relations Board and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the application for enforcement of the order of the National Labor Relations Board in this Cause be, and hereby is AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Filed and entered: January 16, 1990

A TRUE COPY
ATTEST JUL 13 1990
CATHY A. CATTERSON
Clerk of Court
by: /s/ Christine Hill
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
PRINTING SPECIALTIES DISTRICT COUNCIL NUMBER 2, as successor to Printing Specialties District Council Number 1,
Petitioner-Intervenor,
v.
LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,
Respondent.

No. 88-7065
NLRB No. 32-CA-3160

PRINTING SPECIALTIES DISTRICT COUNCIL NUMBER 2, as successor to Printing Specialties District Council Number 1,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 88-7079
NLRB No. 32-CA-3160

ORDER

Before: FARRIS, BOOCHEVER, and HALL,
Circuit Judges

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.),

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 90-235

In the Supreme Court of the United States

OCTOBER TERM, 1990

LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board correctly concluded that since a layoff of employees was not the inevitable consequence of petitioner's decision to change its operations, petitioner must bargain with the union over the layoff.

2. Whether the union's post-contract termination grievances about the layoff were arbitrable under the contract.

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OCTOBER TERM, 1990

No. 90-285

LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 893 F.2d 1128. The decision and order of the National Labor Relations Board (Pet. App. B1-B28) are reported at 286 N.L.R.B. 817.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1990. A petition for rehearing was denied on May 31, 1990. Pet. App. D1-D2. The petition for a writ of certiorari was filed on August 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner prints bank checks at six plants. For a number of years, petitioner and Printing Specialties District Council No. 2 (union) were parties to collective bargaining agreements.[1] During the period relevant to this proceeding, the union represented production and maintenance employees at petitioner's Santa Clara facility, and the last contract between petitioner and the union expired on October 5, 1979. That contract contained a grievance-arbitration procedure for resolving "[d]ifferences that may arise between the parties * * * regarding this Agreement and any alleged violations of the Agreement, [and] the construction to be placed on any clause or clauses of the Agreement." Pet. App. A4 n.1. The contract further provided that

> [w]henever [petitioner] intends to lay off all or part of [its] employees, [it] shall give notice of such intention no later than quitting time of the previous working day. It is also understood that in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal.

Ibid.

Petitioner used two types of printing processes to print bank checks at the Santa Clara facility—the "cold-type" process and the "hot-type" process. In July 1980, petitioner decided for economic reasons to convert the facility entirely to the "hot-type" process and, as a result, laid off ten employees and gave them severance pay. Petitioner did not notify the union about the layoffs or give it an opportunity to bargain. Moreover, petitioner did not lay off those

[1] The union was the successor to Printing Specialties District Council No. 1. Pet. App. A4.

employees on the basis of seniority. Instead, petitioner laid off employees who worked exclusively or primarily on the "cold-type" equipment. Pet. App. A4-A5.

The union filed separate but identical grievances for each laid-off employee, alleging "unjust layoff . . . out of seniority." Pet. App. A6. The union asked petitioner for a meeting to discuss the layoff decision and its impact on the employees. Petitioner, noting that the contract had expired, refused to process the grievances under the contractual grievance and arbitration procedure. It also refused to bargain over the decision to lay off the employees, but offered to discuss the "effects" of the layoff on employees. *Ibid.*

2. In response to unfair labor practice charges initiated by the union, the Board concluded that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain about the layoff decision, by refusing to accept and process the layoff grievances, and by unilaterally repudiating the contractual arbitration procedure. Pet. App. B1-B20.[2] The Board noted that, under *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981), "employers are obligated to bargain over the effects on unit employees of management decisions" even where those decisions "are not themselves subject to the obligation to bargain." Pet. App. B9. "[U]nder the facts of this case," the Board determined, petitioner's "decision to lay off employees [was] not so inextricably intertwined with the conversion decision as to render impossible bargaining over the layoff

[2] Chairman Dotson filed a dissenting opinion. Pet. App. B21-B28.

decision." *Ibid.* The Board found that once petitioner decided to convert to the hot-type process, it had a number of alternatives—other than layoffs—for implementing that decision: petitioner could have retained cold-type employees to work on hot-type equipment, transferred those employees to its other plants or to other positions within the same plant, reduced the workweek for all employees, or adopted a system of rotating layoffs. *Id.* at B10.

Following its recent decision in *Indiana & Michigan Electric Co.*, 284 N.L.R.B. 53 (1987), the Board also concluded that petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to accept and process the layoff grievances and by unilaterally repudiating the contractual arbitration procedure. Pet. App. B5-B9. The decision in *Indiana & Michigan Elec. Co.* had two aspects: First, the Board reaffirmed that an employer may not unilaterally abrogate an existing contractual grievance procedure, nor may it refuse to process grievances under the procedure, even after the contract has expired (284 N.L.R.B. at 54-55);[3] second, in light of *Nolde Bros. v. Local No. 358, Bakery Workers*, 430 U.S. 243 (1977), the Board reexamined its treatment of the obligation of parties to an expired contract to arbitrate grievances occurring after the contract expired. The Board noted *Nolde*'s strong presumption that the contractual obligation to arbitrate grievances arising under the contract extends to post-expiration disputes and concluded that a blanket refusal to arbitrate post-expiration grievances would violate Section 8(a)(5) and (1) of the Act, absent strong evi-

[3] See *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1503 (1962), enforced in relevant part, 320 F.2d 615, 620 (3d Cir. 1963), cert. denied, 375 U.S. 984 (1964).

dence that the parties intended to exclude such disputes from arbitration. 284 N.L.R.B. at 59-60.[4] But the Board read *Nolde* as requiring an employer to arbitrate only those post-expiration grievances "arising under" the expired contract, *i.e.*, disputes concerning "contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." *Id.* at 60.

In light of *Indiana & Michigan Elec. Co.*, the Board here rejected petitioner's contention that there was no obligation to process the grievances through the grievance procedure because the contract had expired. Moreover, the Board concluded that petitioner could not repudiate the arbitration provisions of its expired contract because the contract specified that the "stipulations set forth shall be in effect for the time hereinafter specified." Pet. App. B3; see *id.* at B5-B6.[5]

[4] At the same time, the Board reaffirmed prior decisions holding that a refusal to arbitrate a particular grievance or class of grievances—as opposed to a blanket repudiation of the arbitration procedure—is not a violation of the Act. 284 N.L.R.B. at 60 n.7.

[5] The Board, among other things, ordered petitioner (upon request) to bargain about the layoffs and to process the layoff grievances through the contractual grievance procedure. Pet. App. B15-B17, B18-B19. But the Board refused to order petitioner to arbitrate the layoff grievances, rejecting the union's contention that those grievances "arose under" the expired contract. The Board found that the layoffs that triggered the grievances occurred after the expiration of the contract, that the asserted contractual right—the right to lay off by seniority if other factors were equal—was not "a right worked for or accumulated over time," and that there was no evidence that "the parties contemplated that such rights could ripen or remain enforceable even after the contract

3. The court of appeals enforced the Board's order, but reversed, and remanded for further proceedings that aspect of the Board's decision concluding that the layoff grievances were not arbitrable. Pet. App. A1-A22. On the record presented, the court upheld the Board's determination that "the termination of employees by layoff was not the inevitable consequence of the underlying management decision." *Id.* at A11. The court thus agreed that

> [petitioner] had numerous, and admittedly feasible, alternatives that it could have explored with the Union to avoid or reduce the scope of the layoff without having to reconsider its conversion decision. [Petitioner] suggests no reason other than labor costs for preferring the layoff over any of the suggested alternative courses of action; to the extent the layoff was motivated by a desire to reduce labor costs, it was amenable to bargaining.

Id. at A11-A12. Accordingly, the court held that the Board had "reasonably concluded that the layoff * * * was a mandatory subject of bargaining as an 'effect' of the nonbargainable decision to convert from cold-type to exclusively hot-type printing." *Id.* at A12.

Turning to the Board's conclusion that the layoff grievances did not "arise under" the expired contract, the court of appeals determined that the Board had erroneously focused on "the event (the layoff) that sparked the dispute, and not [on] the substantive contract-based rights (seniority protection against layoff) that were allegedly violated." Pet. App. A19. The court pointed out that, in two later

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expired." *Id.* at B16 (internal quotation marks and citations omitted).

decisions,[6] the Board had found post-expiration disputes involving application of contractual seniority clauses arbitrable, and thus it viewed those decisions as inconsistent with the Board's holding here. *Id.* at A19-A20. Moreover, the court added, the Board's *Indiana & Michigan* standard, by focusing on whether the grievance was based on rights accruing under the contract before termination, was inconsistent with *Nolde Bros.* v. *Local No. 358, Bakery Workers*, 430 U.S. 243 (1977), as well as with Ninth Circuit decisions construing Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185. Pet. App. A20-A21 (citing *Local Joint Executive Bd. of Las Vegas, Culinary Workers Union, Local 226* v. *Royal Center, Inc.*, 796 F.2d 1159 (9th Cir. 1986), cert. denied, 479 U.S. 1033 (1987); *George Day Constr. Co.* v. *United Bhd. of Carpenters, Local 354*, 722 F.2d 1471 (9th Cir. 1984); *O'Connor Co.* v. *Carpenters Local Union No. 1408*, 702 F.2d 824 (9th Cir. 1983)).[7]

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[6] *United Chrome Prods., Inc.*, 288 N.L.R.B. 1176 (1988); *Uppco, Inc.*, 288 N.L.R.B. 937 (1988).

[7] Since it concluded that the Board "erred" in finding that "the layoff grievances in this case were not arbitrable, on the ground that they did not 'arise under' the expired [contract]," the court of appeals "assume[d] without deciding that the Board's *Indiana & Michigan* decision [insofar as it relies on Section 301 precedent such as *Nolde*] is a reasonably defensible construction of the section 8(a)(5) duty to bargain." Pet. App. A18.

ARGUMENT

1. Petitioner contends (Pet. 6-9) that the Board's conclusion—that petitioner must bargain with the Union over the layoff decision—conflicts with *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981). There, this Court determined that the benefits of bargaining about an employer's decision to shut down part of its business for economic reasons are outweighed by the burdens such bargaining would place on an employer's conduct of its business, and thus held that such a decision was not a mandatory subject of bargaining. *Id.* at 686. Nonetheless, the Court recognized that a union facing such a nonbargainable management decision might "offer * * * alternatives that might be helpful to management or forestall or prevent the termination of jobs." *Id.* at 681. The Court therefore made plain that "the union must be given a significant opportunity to bargain about these matters of job security as part of the 'effects' bargaining mandated by § 8(a)(5)." *Ibid.*; see *id.* at 677 n.15.[8]

Here, the layoffs were not an inevitable consequence of petitioner's management decision to convert to hot-type printing. Rather, as the record showed and the Board specifically found, petitioner had available alternatives to the layoffs and thus bargaining about these alternatives would have con-

[8] In *First Nat'l Maintenance*, the Court held that the employer had no duty to bargain about its layoff because, under the circumstances presented, the layoff necessarily followed from its nonbargainable decision to terminate its contract with the particular customer. As the Court noted, the employer in that case hired personnel separately for each customer and did not transfer employees between locations. See 452 U.S. at 668.

cerned only the "effects" of the underlying decision and not the decision itself. Pet. App. B10; see *id.* at A11-A12.[9] Accordingly, the decision below is fully consistent with *First Nat'l Maintenance.*[10]

2. Petitioner also contends (Pet. 10-15) that the court of appeals' conclusion that the union's post-contract termination grievances were arbitrable under the contract conflicts with *Nolde Bros.* v. *Local No. 358, Bakery Workers*, 430 U.S. 243 (1977). In particular, petitioner asserts that the presumption of arbitrability recognized in *Nolde* was rebutted by the fact that the layoffs occurred almost one year after the contract expired and that the contract's no-strike clause—which was the quid pro quo for its promise to arbitrate—was limited to the contract term. Those asserted distinctions, however, are insubstantial. Although the dispute in *Nolde* arose four days after the contract expired, the Court did not hold that a grievance arising on a later date would not have been arbitrable. *Nolde*, 430 U.S. at

[9] To the extent petitioner challenges (Pet. 7-8) the Board's factual findings upheld by the court of appeals, further review is unwarranted. *E.g., Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

[10] Petitioner errs in asserting (Pet. 9-10) that the court of appeals' decision conflicts with *Arrow Automotive Indus.* v. *NLRB*, 853 F.2d 223 (4th Cir. 1988). Although the court of appeals there stated that *First Nat'l Maintenance* established "a per se rule that an employer has no duty to bargain over a decision to close part of its business," 853 F.2d at 227, the court made clear that it was not focusing on "categorization" or "labels," but was making a case-by-case application of the "analysis set forth by the Supreme Court [in *First Nat'l Maintenance*]," *id.* at 229-230. Moreover, the court in *Arrow* had no occasion to address the issues of "effects" bargaining or of what constitutes a bargainable effect. See *id.* at 225 n.2, 231.

255 n.8. Moreover, in *Nolde* the Court necessarily considered irrelevant the fact that the no-strike clause was not coterminous with the employer's duty to arbitrate, holding that "where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication." *Id.* at 255.

As petitioner points out (Pet. 12-16), the courts of appeals are divided over the test *Nolde* sets forth for determining the arbitrability of post-contract termination grievances. The Eighth and Tenth Circuits, in accord with the Board's view,[11] read *Nolde* as calling for arbitration only for those post-contract termination grievances that have vested or accrued. See, *e.g.*, *Chauffeurs Local Union 238* v. *C.R.S.T., Inc.*, 795 F.2d 1400, 1403 (8th Cir.) (en banc), cert. denied, 479 U.S. 1007 (1986); *United Food Workers Union, Local 7* v. *Gold Star Sausage Co.*, 897 F.2d 1022, 1024-1025 (10th Cir. 1990). On the other hand, the Third, Fifth, and Ninth Circuits do not limit the reach of *Nolde* in that manner. See, *e.g.*, *Federated Metals Corp.* v. *United Steelworkers*, 648 F.2d 856, 861 (3d Cir.), cert. denied, 454 U.S. 1031 (1981); *Seafarers Int'l Union* v. *National Marine Servs., Inc.*, 820 F.2d 148, 153-154 (5th Cir.), cert. denied, 484 U.S. 953 (1987); *Local Joint Executive Bd. of Las Vegas, Culinary Workers Union, Local 226* v. *Royal Center, Inc.*, 796 F.2d

[11] In *Indiana & Michigan Elec. Co.*, the Board concluded that a dispute based on events occurring after expiration of the contract "arises under" the contract, and is therefore arbitrable under *Nolde*, only if it "concerns contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." 284 N.L.R.B. at 60.

1159, 1162-1164 (9th Cir. 1986), cert. denied, 479 U.S. 1033 (1987).

Each of those decisions construing *Nolde*, however, arose under Section 301 of the Labor-Management Relations Act. The decision below, by contrast, arose under Section 8(a)(5) of the National Labor Relations Act. Moreover, although the court of appeals disagreed with the Board's standard for determining whether a post-contract termination grievance "arises under" the contract for purposes of determining arbitrability, see Pet. App. A20-A21, that disagreement was only an alternative ground of decision. Initially, the court concluded that even under the Board's own standard, the holding here was inconsistent with more recent Board decisions applying that standard. *Id.* at A19-A20. This alternative ground does not implicate the issue on which the courts are divided. For these reasons, this case is not an appropriate vehicle for resolving that issue.

Finally, petitioner asserts in passing that its "refusal to allow a third person to decide a dispute between [petitioner] and the Union clearly is not a refusal to meet with the Union at reasonable times and confer in good faith." Pet. 15. The duty to bargain imposed by Section 8(a)(5) not only requires the parties to bargain in good faith with respect to the negotiation of an agreement, but also requires the employer, after expiration of the agreement, to refrain from making changes in existing terms and conditions of employment without first bargaining to impasse with the union. See *NLRB* v. *Katz*, 369 U.S. 736 (1962). Since *Nolde* holds that in certain circumstances the arbitration commitment survives the expiration of the collective bargaining agreement embodying it, petitioner's blanket refusal to arbitrate

all post-expiration grievances thus amounted to an unlawful unilateral change in an existing term and condition of employment. See *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 59, 60 n.7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1990

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No. 90-285

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A DIVISION OF LITTON BUSINESS SYSTEMS, INC.

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No. 90-285

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S REPLY BRIEF

STATEMENT OF THE CASE

The National Labor Relations Board issued its decision and order finding the Company had violated Section 8(a)(1) and (5) of the National Labor Relations Act by laying off 10 employees who had worked in a shutdown operation without first bargaining with the Union over the decision to lay off the employees. The Board also found the Company had violated the same provisions of the Act by declining to arbitrate the Union's grievances over the layoffs, a "blanket" repudiation of the arbitration provision of a labor agreement which had expired 11 months before the layoffs, said the Board. However, because the Board found the layoff grievances did not

"arise" under the expired agreement, it declined to order the Company to arbitrate the grievances.

Upon review, the Court of Appeals enforced the Board's order, except it reversed the Board's conclusion the grievances did not "arise" under the expired agreement. In its brief opposing the petition for certiorari, obviously, the Board opposes the granting of the petition with respect to those portions of the decision and order enforced by the Board. However, the Board does not even rise to the defense of its own decision and order with respect to the portion reversed by the Court.

ARGUMENT

1. No one contends the decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) did not cover both the decision to cease operating part of a business *and* the consequent layoff of the employees involved in the shutdown operation. But, in effect, the Board has decided to adopt only part of *First National Maintenance Corp.* (dealing with the decision to shut down) while rejecting part (dealing with the consequent decision to lay off the employees working in the shutdown operation). If this is possible, *First National Maintenance Corp.* does not achieve its stated goal of conferring on management the ability to act with speed and flexibility, free from the uncertainty of legal challenges to its actions which might not be resolved for years. In its brief, the Board emphasizes "the available alternatives" to the layoffs which the Company and Union would have "bargained about." Brief, p. 8. Aside from the fact this precise argument was raised by this Court in *First National Maintenance Corp.*, and was flatly rejected, the Board's argument is self-defeating.

Why? Because, if bargaining over the consequent layoffs is mandatory, the Board's rules on "impasse" and a union's "right to relevant information" guarantee there can be no speed or flexibility in making management decisions; there can be no freedom from the fear and uncertainty that some Court, somewhere, 10 years later, will say to an employer, "You didn't bargain to a good-faith impasse, you didn't give the union the relevant information it requested."

The Company bargains in bad faith, and thus violates Section 8(a)(1) and (5) of the Act, if it unilaterally alters terms and conditions of employment before first reaching a good-faith impasse with the Union, says the Board. Brief, p. 11. A genuine impasse exists when there is no realistic prospect that continued discussions would be fruitful, but "even parties who seem to be in implacable conflict may, by meeting and discussion, forge first small links and then strong bonds of agreement." *AFTRA v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968). Further, "[T]he issue of the existence of an impasse 'is a question of fact peculiarly suited to the Board's expertise.' " *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 65 (2nd Cir. 1979). It is virtually impossible to reach a genuine impasse as long as a union remains anxious to meet, to discuss, to ask questions about the employer's position, to argue against it, to present new "alternatives," to request information, to ask questions about that information, to ask for more information, and then to reexplore everything which has already been covered. An employer never knows if a good-faith impasse has been reached until the Board says so and the last avenue of appeal has been exhausted . . . and that could take a decade.

In *First National Maintenance Corp.*, this Court was concerned that labeling a decision as "mandatory could

afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose." 452 U.S. at 683. Yet, the Board's rules on providing information are a "trap," for even the most experienced labor lawyers. Indeed, the United Autoworkers Union has issued a manual explaining how unions can use requests for information to delay and thwart an employer's decisions. The manual is entitled *Strategies Against Shutdowns: A UAW Plant Closing Manual* and is part of the record reviewed in *National Metalcrafters, Inc.*, 276 NLRB 90 (1985), so the Board is aware of a union strategy to use the Board's rules on providing information as a tool for delay and thwarting management decisions. An example of the use of this "tool" to delay can be seen in the Union's request for information after the Board issued its decision in this case. See addendum.

The Board view of *First National Maintenance Corp.* places an employer desiring to shut down an operation for legitimate reasons in an untenable position. It may be losing substantial amounts of money on the operation because of an obsolete plant and equipment or, perhaps, the market for the product has simply disappeared. What is the employer to do? Shut down the operation and keep employees on the payroll with nothing to do while it bargains for months with a union bent on delay? Keep producing products at a loss or for which there are no customers while a union drags negotiations on indefinitely, according to the manual? Go ahead and lay off employees and risk the chance of a big back-pay award 10 years later?

Petitioner submits this is not what this Court had in mind when it spoke of mangement's "need for unencumbered decisionmaking." The Board's approach

requiring that every case involving a partial shutdown has to be decided by the Board and all avenues of appeal exhausted on the issue of bargaining over the consequent layoff of employees before there can be any legal certainty simply will not work. The Board simply has not accepted the fact that it lost in *First National Maintenance Corp.*; and in this and other cases, it is seeking to evade or emasculate the holding in that case.

2. The Board contends the fact the grievance in this case arose almost one year after the expiration of the arbitration agreement and the fact the no-strike clause in the labor contract was specifically limited to the term of the contract are "insubstantial" distinctions. Brief, p. 9. Petitioner submits more than 11 months is not an "insubstantial" period of time, and it is not an "insubstantial" matter that the Board says the Company must arbitrate grievances over which the Union may strike.

The Board concedes "the courts of appeals are divided over the test *Nolde* sets forth for determining the arbitrability of post-contract termination grievances." Brief, p. 10. But, says the Board, that makes no difference here because those conflicting decisions involved Section 301 of the LMRA, while this case involves Section 8(a)(5) of the NLRA. But in its decision in this case, the Board relied on *Nolde*, so the argument of the Board in its brief that *Nolde* has no application here simply holds no water. If the Board relies on *Nolde*, a Section 301 suit, to support its decision and order in this case, a Section 8(a)(5) suit, and the Courts of Appeals are divided on *Nolde*, then its seems obvious this Court should grant the petition for certiorari and create some clarity out of the confusion.

On the other hand, if the Board's argument that *Nolde* is not applicable in a Section 8(a)(5) case has merit, the Board decision and order in this case has no foundation.

In effect, the Board itself has withdrawn the very foundation upon which it based it decision in this case. Without *Nolde* to support its decision, the Board has only Section 8(a)(5) upon which to rely, and that section is circumscribed by Section 8(d), which specifically defines the obligation to bargain. If anyone can point to any language in Section 8(d) which includes the obligation to arbitrate post-contract termination grievances, they should do so, because Congress never put it in there.

As a way out of this dilemma, the Board, in its brief, attempts to fall back on the argument an employer violates Section 8(a)(5) of the Act if it makes changes in existing terms and conditions of employment without first bargaining to an impasse with the union after the expiration of an agreement. Brief, p. 11. But the Board, *in its decision,* did not advance this theory. It is the Board and Court of Appeals decision which petitioner seeks to have reviewed, not Board Counsel's post hoc rationalizations. Indeed, in its decision, the Board expressly reaffirmed that "the arbitration commitment arises solely from mutal consent and that Congress did not intend the National Labor Relations Act to operate to create a statutory duty to arbitrate." 286 NLRB No. 79 (Petition Appendix B5). Board Counsel cannot have it both ways, arguing in his brief, as he does, that Section 8(a)(5) imposes an obligation to arbitrate post-contract termination grievances, while the Board, in its decision, argues that the obligation to arbitrate such grievances is purely consensual and does not arise from the Act.

In any event, this Court has long held that arbitration is purely a matter of mutual consent. *See Nolde Bros., Inc. v. Bakery Workers,* 430 U.S. 243, 250. If there is an obligation to arbitrate a post-contract termination grievance, it is based on mutual consent and not this

"unilateral change of working conditions" theory now articulated for the first time in Board Counsel's brief. This deficiency in Board Counsel's theory is clearly pointed out by Justice Stewart and [then] Justice Rehnquist in the dissenting opinion in *Nolde Bros.,* 430 U.S. 243 at 257.

The petition should be granted.

Dated: November 12, 1990

Respectfully submitted,

M. J. DIEDERICH

Attorney for Petitioner
Litton Financial Printing Division,
a Division of Litton Business
Systems, Inc.

APPENDIX A

LAW OFFICES
VAN BOURG, WEINBERG, ROGER & ROSENFELD
875 Battery Street, San Francisco, California 94111
Telephone (415) 864-4000

(Attorney names and additional address omitted in printing.)

December 4, 1987

M.J. Diederich, Esq.
Litton Corporation
360 North Crescent Drive
Beverly Hills, CA 90210-4867

RE: Litton Financial Printing Division v. Printing Specialties and Paper Productss [*sic*] Union, et al.
NLRB Case No. 32-CA-3160

Dear Mr. Diederich:

The union believes that it would be appropriate to meet with you to discuss the layoffs. In preparation for the meeting, we need you to provide the following information. We will need that information in sufficient time to review it with the affected employees. The information needed is described below.

We suggest a meeting in the Bay Area and please let me know specifically when you would like to have that meeting. The union would also prefer to process the grievances and believe it would be appropriate to do so at such a meeting.

The information which the union needs (for both purposes of bargaining as well as processing the grievances) is the name of each worker who continued working after

the layoffs in 1980. We need to know the amount of hours worked each week until the plant closed. In addition, we need to know the kind of work performed by each employee during each of those weeks in which he or she worked. In addition, the union will need to examine production records to determine the kind of work which was done. Finally, the union needs to examine the personnel files of each of the employees involved.

Sincerely,

/s/ David A. Rosenfeld

DAVID A. ROSENFELD

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No. 90-285

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Counsel for Respondent NLRB

PETITION FOR CERTIORARI FILED AUGUST 14, 1990
CERTIORARI GRANTED NOVEMBER 13, 1990

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v. National Labor Relations Board
No. 90-285

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09/10/81	Respondent's (Litton's) Exceptions to Decision of Administrative Law Judge
09/23/81	Exceptions (Union's)
09/25/81	General Counsel's Exceptions to the Decision of the Administrative Law Judge
11/06/87	Decision and Order (NLRB)
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02/23/88 Answer of Litton Financial Printing Division, A Division of Litton Business Systems, Inc., as of February 8, 1988

02/06/88 Motion of Charging Party (Union) to Intervene, as of February 25, 1988

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04/01/88 Motion of the National Labor Relations Board for Consolidation of Causes

04/13/88 Order (Granting Motion to Consolidate)

01/11/89 Argued and Submitted to: Farris, Boochever and Hall

01/16/90 Memorandum Opinion Filed

01/16/90 Judgment

01/30/90 Petition for Rehearing, and Suggestion for Rehearing, En Banc, on Behalf of Litton Financial Printing, A Division of Litton Business Systems, Inc.

01/31/90 Judgment Entered

05/31/90 Order (Denying Petition for Rehearing and Rejecting Suggestion for Rehearing En Banc)

07/13/90 Mandate Issued

08/23/90 Notice from Supreme Court Petition for Certiorari Filed

Proceedings before the United States Supreme Court

08/14/90 Petition for Writ of Certiorari

11/13/90 Order (Granting Petition, Limited to Question 2)

NATIONAL LABOR RELATIONS BOARD

Litton Financial Printing Division, etc.
and
Printing Specialties and Paper Products Union, etc.

Case No. 32-CA-3160

November 6, 1987

DECISION AND ORDER

The Decision and Order of the National Labor Relations Board has already been reproduced in the Petition for Writ of Certiorari, and can be found in the Appendix to the petition at B1-B28.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

National Labor Relations Board,
Petitioner,
Printing Specialties District Council, etc.,
Petitioner-Intervenor,
v.
Litton Financial Printing Division, etc.,
Respondent.

Printing Specialties District Council, etc.,
Petitioner,
v.
National Labor Relations Board,
Respondent.

Cases Nos. 88-6065 and 88-7079

January 16, 1990

OPINION

The Opinion of the United States Court of Appeals for the Ninth Circuit has already been reproduced in the Petition for Writ of Certiorari, and can be found in the appendix to the petition at A1-A22.

NATIONAL LABOR RELATIONS BOARD
Case No. 32-CA-3160

CHARGE AGAINST EMPLOYER

[Printers Note: Form instructions omitted in printing.]

Case No. 32-CA-3160
Date Filed October 27, 1980

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT
   a. Name of Employer
      LITTON FINANCIAL PRINTING
   b. Number of Workers Employed
      45 in Unit
   c. Address of Establishment
      2260 De La Cruz Blvd, Santa Clara, CA 95050
   d. Employer Representative to Contact
      Mary Arnold
   e. Phone No.
      (408) 727-3262
   f. Type of Establishment
      Printing
   g. Identify Principal Product or Service
      Checks
   h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge

Within the last six months preceding the filing of this charge, the above-named employer has refused to meet with the certified bargaining representative and/to process a grievance regarding the layoffs of various employees.

Relief is sought by way of a reinstatement order and back pay until the Company completes its bargaining obligation.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge
Printing Specialties & Paper Products Unions District Council No. 1

4a. Address
2267 Telegraph Avenue, Oakland, California 94612

4b. Telephone No.
(415) 451-0309

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit
International Printing and Graphic Communications Union

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

DAVID A. ROSENFELD

By /s/ DAVID A. ROSENFELD

Title _____

VAN BOURG, ALLEN,
WEINBERG & ROGER

Address 875 Battery Street
San Francisco, CA 94111

Telephone number (415) 864-4000

Date October 23, 1980

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. Code, Title 18, Section 1001)

NATIONAL LABOR RELATIONS BOARD
Case No. 32-CA-3160

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
REGION 32

LITTON FINANCIAL PRINTING DIVISION,
A DIVISION OF LITTON BUSINESS
SYSTEMS, INC.
and
PRINTING SPECIALTIES AND
PAPER PRODUCTS UNION,
DISTRICT COUNCIL NO. 1,
INTERNATIONAL PRINTING AND
GRAPHIC COMMUNICATIONS UNION

Case 32-CA-3160

COMPLAINT AND NOTICE OF HEARING

It having been charged by Printing Specialties and Paper Products Union, District Council No. 1, International Printing and Graphic Communications Union, herein called Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby

issues this Complaint and Notice of Hearing and alleges as follows:

1.

The charge was filed by the Union on October 27, 1980, and a copy thereof was served on Respondent by certified mail on or about the same date.

2.

(a) At all times material herein, Respondent, a New York corporation with an office and place of business in Santa Clara, California, has been engaged in the wholesale printing and distribution of financial documents.

(b) During the past twelve months, Respondent, in the course and conduct of its business operations, purchased and received goods or services valued in excess of $50,000 directly from suppliers located outside the State of California.

(c) During the past twelve months, Respondent, in the course and conduct of its business operations, sold and shipped goods or services valued in excess of $50,000 directly to customers located outside the State of California.

3.

Respondent is now, and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4.

The Union is now, and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

5.

At all times material herein, Mary Arnold occupied the position of Respondent's Plant Manager and is now, and has been at all times material herein, a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

6.

The following-described employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All maintenance and production employees employed by Respondent at its 2260 DeLa Cruz Boulevard, Santa Clara, California facility; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

7.

(a) Since on or about October 6, 1974, and continuing until at least October 5, 1979, the Union has been the designated exclusive collective bargaining representative of the employees in the Unit, and during said time the Union has been recognized as such representative by Respondent. Such recognition has been embodied in successive collective bargaining agreements, the most recent of which is effective by its terms for the period October 6, 1978 to October 5, 1979.

(b) The most recent collective bargaining agreement referred to in subparagraph (a) above contained, *inter alia*, a Grievance Arbitration Clause (Section 21), and a clause pertaining to the layoff of employees in the Unit (Section 12).

8.

On July 2, 1980, in Case 32-RD-170, the Union was certified as the exclusive collective bargaining representative of the employees in the Unit.

9.

At all times since July 2, 1980, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the Unit, for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

10.

On or about August 29, 1980, and at all other times material herein the maximum number of employees in the Unit amounted to forty-five employees.

11.

(a) On or about August 29, 1980, Respondent permanently laid off the following-named employees:

(a) Gerda Brosig	(f) Catherine Kliec
(b) Jean Ceccato	(g) Claire Lundegard
(c) Mildred Baker	(h) Gloria Hernandez
(d) Terri Marquez	(i) Eileen Mueller
(e) Helen Soto	(j) Carmen Mata

(b) Respondent engaged in the conduct described above in paragraph 11(a) in non-conformity with the contractual layoff clause [Section 12] described above in paragraph 7(b).

12.

Commencing on or about August 29, 1980, Respondent bypassed the Union and dealt directly with employees in the Unit, by paying to the employees identified above in paragraph 11, severance pay not provided for in

the collective bargaining agreement described above in paragraph 7.

13.

(a) On or about September 24, 1980 the Union, by letter, filed grievances on behalf of the laid-off employees identified above in paragraph 11, and requested Respondent to process said grievances.

(b) On or about September 24, 1980 the Union, by letter, requested Respondent to bargain collectively with it as the representative of said employees with respect to the layoff and the impact of the layoff on the individuals identified in paragraph 11.

14.

(a) Since on or about October 3, 1980, and continuing to date, Respondent has failed and refused, and continues to fail and refuse, to process the grievances described above in paragraph 13(a).

(b) Since on or about October 3, 1980, and continuing to date, Respondent has failed and refused, and continues to fail and refuse, to bargain with the Union as the exclusive collective bargaining representative of the employees in the Unit with respect to Respondent's decision to layoff the individuals identified above in paragraph 11.

15.

By the acts and conduct described above in paragraphs 12, 14(a) and 14(b), and by each of said acts, Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the representative of its employees, and Respondent thereby has been engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 19th day of March, 1981, at 9:00 a.m., Pacific Standard Time, at a location in Oakland, California to be designated hereafter, and continuing on consecutive days thereafter, a hearing will be conducted before a fully designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the undersigned, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

DATED AT Oakland, California this 24th day of November, 1980.

/s/ James S. Scott
JAMES S. SCOTT, Regional Director
National Labor Relations Board
Region 32
2201 Broadway, P. O. Box 12983
Oakland, California 94604

NATIONAL LABOR RELATIONS BOARD
Case No. 32-CA-3160

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC.
and
PRINTING SPECIALTIES AND PAPER PRODUCTS UNION, DISTRICT COUNCIL NO. 1, INTERNATIONAL PRINTING AND GRAPHIC COMMUNICATIONS UNION

Case 32-CA-3160

ANSWER

Litton Financial Printing Division, a Division of Litton Business Systems, Inc., answers the Complaint herein as follows:

1. Admits the allegations set forth in paragraphs 1 through 6, inclusive.

2. Denies the allegations set forth in paragaph 7, except admits the existence of a collective bargaining agreement between the Company and Union, the terms of which speak for themselves.

3. With respect to the allegations of paragraph 8, the Company alleges the certification issued was invalid due to improper conduct on the part of the Union during the critical period preceding the election conducted on or about August 17, 1979.

4. Denies the allegations set forth in paragraph 9.

5. Admits the allegations set forth in paragraph 10.

6. Denies the allegations set forth in paragraphs 11 and 12.

7. Admits that on September 24, 1980 the Union sent a letter to the Company regarding certain layoffs, the terms of which will speak for themselves; otherwise the Company denies the allegations of paragraph 13.

8. Admits the allegations of paragraph 14(a) and alleges that on September 24, 1980 there was no collective bargaining agreement in effect between the Company and Union, and none had been in effect on that date for substantially one (1) year, and that the matters sought to be grieved took place approximately one (1) year after the expiration of the expired agreement between the parties.

Admits the allegations set forth in paragraph 14(b).

9. Denies the allegations set forth in paragraph 15.

As an Affirmative Defense, the Company alleges,

1. That on the date of the layoffs in question, the Union did not represent a majority of the employees in an appropriate unit for purposes of collective bargaining.

2. That on such date, there was no collective bargaining agreement in effect between the Company and Union.

3. That even if the expired agreement had been in effect, there is no provision in that agreement limiting the right of the Company to lay off employees for economic reasons, and that in practice, the Company had always exercised the right to lay off employees for economic reasons without notifying the Union or bargaining with the Union concerning the decision to lay off

employees; that the layoffs in question were purely for economic reasons.

4. That said layoffs were based upon a decision that was essentially financial and managerial in nature, which involved a significant realignment and reallocation of the Company's capital and involved a different method by which the Company would produce its products, by reason of which such decision under current Board law and case law of the Court of Appeals for the Ninth Circuit is not a mandatory subject of bargaining.

5. That the Company has not refused any clear and unequivocal demand from the Union to bargain over the effects of the layoffs.

WHEREFORE, the Company prays that the Complaint be dismissed.

Dated: December 4, 1980

/s/ M. J. Diederich

M. J. Diederich
Attorney for Litton
Financial Printing Division
360 No. Crescent Drive
Beverly Hills, California 90210
Telephone (213) 273-7860

[COLLECTIVE BARGAINING AGREEMENT]
NATIONAL LABOR RELATIONS BOARD
Case No. 32-CA-3160

General Purpose of Agreement
Recognition
Wages
New or changed jobs
Night shift differential
Hours
Time Basis
Hours of employment
Overtime
Holidays
Vacations
Notice of Layoff
Injury on Job
Pay Day
Union Membership
Bulletin Board
Union Representatives
Discharge
Arbitration
Strikes — Lockouts
Grievance procedure — Arbitration
Hopsital [*sic*] & Health plan
Retirement plan
Leave of Absence
Jury Duty Pay
Death in Family
Sick Leave Pay
Company Promotions
Supervisors
Wage Controls
Term of Agreement

LITTON FINANCIAL PRINTING COMPANY
DIVISION OF LITTON INDUSTRIES
SANTA CLARA, CALIFORNIA
AND
PRINTING SPECIALTIES & PAPER PRODUCTS
UNION, LOCAL NO. 777, AFFILIATED WITH
DISTRICT COUNCIL NO. 1.

This Agreement by and between LITTON FINANCIAL PRINTING COMPANY, DIVISION OF LITTON INDUSTRIES, SANTA CLARA, hereinafter referred to as the Employer, and the PRINTING SPECIALTIES & PAPER PRODUCTS UNION NO. 777, AFFILIATED WITH DISTRICT COUNCIL NO. 1, subsidiary of the International Printing Graphics Communications Union of North America, hereinafter referred to as the Union.

WITNESSETH: That the above parties do mutually agree that the stipulations set forth shall be in effect for the time hereinafter specified.

SECTION 1
GENERAL PURPOSE OF AGREEMENT

The general purpose of the Agreement is, in the mutual interest of the Employer and the employees, to provide for the operation of the plant hereinafter mentioned under methods which will further, to the fullest extent possible, the safety of the Employees, economy of operation, quality and quantity of output, cleanliness of plant and protection of property. It is recognized by this Agreement to be the duty of the Company and the employees to cooperate fully, individually and collectively, for the advancement of said conditions.

SECTION 2
RECOGNITION

The Employer recognizes the Union as the sole and exclusive collective bargaining agent for all Production and Maintenance employees in the Santa Clara Plant of the Employer who are listed by occupation under Exhibit "A" to this Agreement, and for those who may subsequently be listed under Exhibit "A" as a result of determination of Section 4 of this Agreement.

SECTION 3
WAGES

Wage rates set forth in Appendix "A" shall be the minimum wage rate paid by the Employer to employees working in the classification specified. Appendix "A" is hereby made part of this Agreement.

When an employee is assigned to fulfill a job with a higher wage rate than that of his regular job classification for more than one hour in the regular work day, he shall be paid for all hours worked in which he fulfills the higher paid job at the higher wage rate. If an employee is temporarily assigned to a job classification with a wage rate lower than his regular job assignment, his wage rate shall not be changed.

SECTION 4
NEW OR CHANGED JOBS

If during the term of this Agreement, the Employer changes methods, installs new equipment, eliminates or combines equipment or jobs, which substantially affects the content of an existing job, or if he establishes a new

job, the wage rate paid by the Employer of such affected job, after such job has been in operation for thirty (30) working days, will be subject to negotiations. If the parties are unable to agree to a wage rate within ninety (90) days after the job first went into operation, it may be referred to arbitration under the Grievance Procedure of this Agreement. A wage rate agreed to through the process of negotiation, or arbitration, will be considered the appropriate wage rate and will be made retroactive to the date the change or job first went into operation.

SECTION 5
NIGHT SHIFT DIFFERENTIAL

A shift differential of $.15 per hour worked will be paid to employees whose straight time shift is the second shift and a differential of $.18 per hour will be paid to employees whose straight time shift is the third shift.

SECTION 6
HOURS

Hours of work for all employees on regular day and night shifts shall be eight (8) hours per day, forty (40) hours per week.

SECTION 7
TIME BASIS

Work shall be done on a time basis only.

SECTION 8
HOURS OF EMPLOYMENT

A. (1) For the purpose of applying the night shift differential the normal hours of work shall be as follows:

a) The first or day shift shall start between 7:00 AM and 8:00 AM.

b) The second shift shall start between 3:00 PM and 4:30 PM.

c) The third shift shall start between 11:00 PM and 12:30 PM.

(2) The starting time of the various shifts shall not be changed except upon one weeks written notice or by mutual consent of the Company and the Union.

(3) An employee whose work day overlaps from the first shift into the second shift or from the third shift into the first shift shall be paid the rate of the shift in which the major portion of this time is worked during the particular day.

B. In case any employee reports for work, whether it be one of his regular days or on his day off, having been ordered to report for such work and then no work is provided, he shall nevertheless receive four hours pay for so reporting; if he starts he shall be paid for the full shift; provided, however, in the case of emergencies such as fire, earthquake, or breakdown of equipment, or other such causes beyond the control of the Employer, no allowance for so reporting shall be paid.

C. If any employee starts work on an overtime day he shall be paid for a minimum of four hours except in the exceptions enumerated above.

D. It is agreed that the time for the start of the employee's shift may be changed at any time by the

Management upon notification to the employee before the end of his last preceeding [*sic*] regular shift, provided that there shall be a rest period of not less than twelve hours between the end of one shift and the beginning of the next shift otherwise the overtime rate shall be paid.

SECTION 9
OVERTIME

A. All time in excess of a regular shift shall be overtime and shall be paid for at time and one-half the employee's regular rate of pay for the first four hours and double time thereafter.

B. If employees are worked over five consecutive hours without a lunch period, all time worked in excess of those five hours without a meal period shall be paid at one and one-half times the straight or overtime rate as the case may be.

C. Saturday work: All shifts worked on Saturday, the sixth day of the work week, shall be on a time and one-half basis — See Section 8 — Hours of Employment.

D. Sunday work: All shifts worked on Sunday, the seventh day of the work week, shall be paid for at double the employee's regular rate of pay. Overtime shall be at the rate of time and one-half the Sunday rate of pay.

E. (1) When overtime work assignments are required the Company will assign the overtime to senior qualified employees on the shift and in the department involved. If a senior employee on the shift is excused from an assignment, the Company will then assign the next most qualified employee on the shift and department involved to perform the work.

(2) Each week a form will be posted on the bulletin board. Any employee desiring to work overtime on the weekend shall affix his signature to the form. If overtime is necessary on the weekend, the Company will first assign the senior qualified employee(s) whose name(s) appear on the list, irrespective of their regular shift.

(3) Any employee who is assigned overtime in accordance with the foregoing, but does not fulfill such assignment without just cause, subjects himself to the appropriate consequences involving loss of any applicable amount of future overtime work opportunities.

(4) For the purpose of assigning overtime only, an employee's most recent regular assignment in the department will determine his seniority day and the following department will be recognized: Typing, Duplicating, Finishing, Shipping, and Maintenance.

F. Work before an employee's starting time or after quitting time shall be paid for at overtime rates. By mutual consent between the employee and management, an employee may start early or late and work eight hours at straight-time rates.

SECTION 10
HOLIDAYS

A. New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Veteran's Day, Thanksgiving Day, Day Before Christmas and Christmas Day shall be recognized as holidays. A Holiday shall

begin at 7:00 AM of the day itself or of the legal day of observance and continue to 7:00 AM of the following day. The rate of pay for all work done on holidays shall be as provided in Section 10(B). Overtime shall be time and one-half the holiday rate of pay.

B. Paid Holidays: Employees shall be paid one day's straight-time pay at the employee's regular rate for the following holidays (or the days legally celebrated) when not worked: New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Veteran's Day, Thanksgiving Day, Day Before Christmas and Christmas Day. To be eligible for holiday pay an employee must have:

(1) performed work within the sixteen calendar days preceding the holiday; and
(2) he must have worked his scheduled shifts immediately preceding and immediately following the holiday, unless excused from either or both because of a reason such as illness, accident, death in family, etc.

The foregoing notwithstanding, if an employee has been absent from work for not more than ninety (90) calendar days preceding the holiday because of a disability incurred in the Company's services and for which he is receiving workman's compensation, he shall, nevertheless, be entitled to holiday pay.

No employee shall be obliged to work on these holidays but any employee who does work on these days shall be paid for work performed at two and one-half times the employee's regular rate and the regular rate for the remainder of the shift not worked. Where a holiday falls on Saturday, the rate of pay for work performed shall be two and one-half times the hourly rate paid the

employee, for the same class of work during the regular straight-time work week, and time and one-half for the remainder of the shift not worked, but the Employer shall have the option of recognizing the previous Friday as the paid holiday instead of Saturday. If a holiday occurs in an employee's vacation period, the employee shall be given an extra day with pay at straight time.

SECTION 11
VACATIONS

A. Each year an employee who has at least one year of continuous service with the Company and who worked at least 1500 hours in the preceding year will be entitled to three weeks vacation with pay.

B. Employees who as of the beginning of the year have not worked a total of 1500 hours in the preceding year will be entitled to a pro rata vacation in an amount equivalent to 6% of the total hours they did work. Hours which do not equal a full day (8 hours) will be paid for in cash and in lieu of time away from work.

C. Each hour of vacation pay shall be on the basis of the employees straight-time rate of his regular job classification. Two weeks (10 working days) of vacation pay shall be consecutive except where otherwise mutually agreeable and shall be granted at times most desirable to the employees, but the final right of allotment of vacation period is reserved to the Company in order to insure efficient plant operation. Except where otherwise mutually agreeable, the employees shall be given at least two weeks prior notice of his or her vacation period. The third week (five working days) of vacation may be taken by mutual agreement between the foreman and the employee at any time during the calendar year and may be divided into periods of two and three days each,

provided each such period shall precede or follow a weekend.

In instances where Employees performing the same type of work in the plant desire the same vacation period, but all cannot be granted the same time because of efficient plant operation, length of service will determine which Employee will be granted the preferred period. Each year the Company will post, no later than March 1, a form for the Employee to request their vacation period for the year.

D. Should an Employee leave an Employer the Employee shall be entitled to vacation on the basis of 2.3 hours pay per week in which he has worked not less than 60% of the straight-time hours for his shift.

E. Time lost as a result of an accident suffered during the course of employment as recognized by the Workmen's Compensation Board shall be added to time worked during the vacation year to qualify under the provisions of this Section.

SECTION 12
NOTICE OF LAYOUTT [*sic*]

A. Whenever an Employer intends to layoff all or part of his employees, he shall give notice of such intention not later than quitting time of the previous working day. It is also understood that in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal.

B. The probationary period of all employees shall be three months.

C. Any person employed in an apprenticeship may be removed from that apprenticeship at the discretion of Management at any time during the first twelve months.

D. The Company will notify the Union Steward and the Union office of all new hires and terminations within seven working days of such.

E. The Company will supply the Union with an updated seniority list semi-annually.

F. (1) When it is necessary to increase the number of jobs in the bargaining unit or to replace an employee who is terminated, the Company will recall the most senior employee in layoff status who is qualified to perform the work required.

(2) An employee who is laid off shall retain his seniority status for twelve (12) months. During such period, he shall not be entitled to fringe benefits such as vacation or holidays.

(3) An employee shall lose his seniority for any of the following reasons:

(a) Quit (resignation)
(b) Discharge for "just cause"
(c) Failure to report to work after expiration of an approved leave of absence.
(d) Failure to report to work within three (3) work days when recalled from layoff, except in case of illness or accident. Notice of recall from layoff shall be by certified mail to last known address.
(e) Layoff for more than twelve (12) months.
(f) Absence for more than twelve (12) months for reason of accident or illness unless extended by mutual agreement by the parties.

SECTION 13
INJURY ON JOB

If an employee is injured on the job and is required to consult a doctor, and if the doctor recommends that he not return to work then he shall be paid for a full straight-time shift for that day. Where possible, the Employer and the Union will be notified of any absence beyond that day.

In cases of Industrial Accidents only, if an injured Employee is returned to work and later must return to the doctor, such Employee shall be paid for time lost if the return appointment is during the Employee's normal working hours, only in cases where the appointment cannot be scheduled during non-working hours.

SECTION 14
PAY DAY

A day shall be established by the Employer as pay day. On such day all wages shall be paid before Noon which are earned and unpaid at the close of Sunday preceeding [*sic*] the weekly pay day; provided that when an employee is discharged all wages earned and unpaid shall be paid immediately. When laid off, or when an employee quits or resigns his employment, all wages earned and unpaid must become due and payable within thirty-six hours.

SECTION 15
UNION MEMBERSHIP

A. Thirty-one days after making this Agreement every worker employed under it and now employed,

shall be required as a condition of employment to obtain and retain membership in the Union. Thirty-one days after the beginning of his employment, each worker employed after making this Agreement shall be required as a condition of employment to obtain and retain membership in the Union.

B. The Company will deduct monthly Union dues and initiation fees from the earnings of employees who authorize such deductions on an approved form and which is not in conflict with any statute.

C. When new or additional employees are needed the Employer will notify the Union of the number and classification of employee required so the Union may refer applicants for the vacancies to be filled.

SECTION 16
BULLETIN BOARD

The employer shall supply a glass enclosed Bulletin Board for the use of the Union in posting officially signed Union Bulletins.

SECTION 17
UNION REPRESENTATIVES

The business representative or other duly authorized Union representatives shall be permitted to visit the plant during operating hours for the purpose consistent with this Agreement, provided that he first notify the management before entering the plant. This privilege may not be abused.

SECTION 18
DISCHARGE

A. The Management has the right to discharge any employee for just cause.

B. The Shop Steward of the Union shall be notified if any Employee is being laid off or discharged.

SECTION 19
ARBITRATION

Differences that may arise between the parties hereto regarding this Agreement and any alleged violations of the Agreement, the construction to be placed on any clause or clauses of the Agreement shall be determined by arbitration in the manner hereinafter set forth.

SECTION 20
STRIKES — LOCKOUTS

There shall be no lockouts on the part of the Employer, and the Union and its members, individually and collectively, agree that there shall be no strikes, boycotts, sitdowns, stoppages of work or any other form of interference with production or other operations on the part of the employees during the term of this Agreement.

SECTION 21
GRIEVANCE PROCEDURE

A. Should an employee have a grievance as to the interpretation or application of the terms of this Agreement, there shall be no suspension or interruption of

work on account of such matter and a diligent effort will be made to settle the matter as soon as possible after it has been presented to management. When an employee has a grievance he shall submit same as promptly as possible, but no grievance shall be valid if not presented within fifteen (15) days from the time the cause of the complaint became known to the grievant.

B. When an employee has a grievance the following procedure shall apply.

STEP 1. Between the immediate supervisor and the aggrieved employee, and if the employee so chooses, the Steward.

STEP 2. If the matter is not resolved in Step 1 within three (3) days after it was discussed with the grievant's immediate supervisor, it shall be reduced to writing and submitted to the Plant Manager. The Plant Manager, the shop Steward and a representative of the Union will meet at a mutually convenient time to resolve the matter.

C. If the matter cannot be resolved as provided in Step 2 within two (2) weeks, the matter may then be jointly submitted in writing within twenty (20) calendar days to the American Arbitration Association under its rules then in effect. The award or decision of the arbitrator shall be binding on both parties to this Agreement. Such decision involving a grievance shall be within the scope and terms of this Agreement but shall not change any of its terms. Failure to follow the time limits as provided in this Article, in processing a grievance shall constitute a waiver of the grievance.

Cost of the arbitrator, but excluding expenses for counsel and witnesses, shall be shared by the employer and the union equally.

D. The Union agrees to elect from the employees in the plant a shop committee of three (3) persons for the first one hundred (100) employees and one (1) person for every portion of one hundred (100) employees thereafter.

Said committee shall consist of not less than three (3) and not more than five (5) employees.

E. The cost of the arbitration shall be shared equally by both parties. All other costs incidental to the arbitration proceedings shall be borne by the parties incurring the cost.

SECTION 22
HOSPITAL AND HEALTH PLAN

The present contribution by the Employer to the Printing Specialties and Paper Products Health and Welfare Fund of forty-four dollars ($44.00) per month per Employee, will continue through June 30, 1975, for those Employees working or paid for eighty (80) hours or more per month.

Beginning July 1, 1975, the Employer will contribute to this Fund, fifty-five dollars and seventy-six cents ($55.76) per month for each Employee based on June, 1975 hours. This amount ($55.76) will continue through July 1, 1978.

In the event a Federal or State Health Plan is legislated, this Section will be reopened and amended, if appropriate, to assure that Employees will receive at least the same benefits as now provided by this Plan and that the Company's costs will not be increased and/or, if feasible, reduced.

SECTION 23
RETIREMENT PLAN

The Employer and the Union hereby accept, ratify and become bound by the terms of that certain Trust Agreement and Retirement Benefit Plan, dated October 1, 1955, establishing the Pressmen's Retirement Fund, the same as though they were signatory parties thereto.

The Employer shall contribute monthly to the Pressmen's Retirement Fund the sum of twenty-one dollars and sixty-five cents ($21.65) per month per employee working or paid for eighty (80) hours or more per month. Said contributions shall be made in the manner prescribed by the Retirement Fund Committee.

The parties agree that the provisions of this section shall be binding and in full force and not subject to change during the term of this agreement.

It is understood and agreed that the contributions to the Pressmen's Retirement Fund shall constitute deductible business expense by the Employer for income tax purposes.

SECTION 24
LEAVE OF ABSENCE

A. An Employee who has been with the Company for one year may be allowed a leave of absence without pay for justifiable cause. Such leave is not to exceed thirty (30) days (except as provided as follows:) Employees desiring a leave of absence must so request in writing and it must be approved by the Company in writing. The Company will furnish the Union or their authorized representative a copy of the leave form upon approval.

Same to contain name and address. Seniority shall accumulate during such leave.

B. Extension of Personal Leave: Extension of leave of absence for a period beyond thirty (30) days may be granted at the discretion of the Company in unusual cases and for justifiable cause, if requested by the employee in writing before the expiration of the first thirty (30) days of leave of absence. If any extension is granted by the Company, the Union shall be notified. Employees on extended leave of absence shall not accumulate seniority for more than six (6) months.

C. Failure to Return from leave: Any employee granted leave of absence under the provision of this Article, who does not return to work upon the expiration of such leave of absence or is found to have accepted other employment, shall be considered to have terminated his employment, unless otherwise mutually agreed upon between the Company and the Union.

D. If an employee is elected or appointed to a full-time position with the Union, he shall upon proper application be granted a leave of absence not to exceed one year.

E. Leaves of absence in cases of pregnancy shall conform to the applicable law.

SECTION 25
JURY DUTY PAY

Employees who have established seniority who lose regular straight time hours of work because they are required to report to the court for jury service, shall upon presentation of a statement signed by an officier [*sic*] of the court which signifies the time involved shall

be reimbursed for regular straight time hours lost less the amount of money received from the court.

A day shift employee who is excused by the court in time to work at least one-half of his shift must report for work in order to be entitled to the benefit herein provided.

A swing shift employee must not report for his shift on the day he is required to report for jury duty if such call consumes a total of at least five (5) hours. Reasonable travel time to and from the court will be considered as time spent in the service of the court.

SECTION 26
DEATH IN THE FAMILY

Employees shall be compensated for loss of time from work to attend the funeral or make arrangements for the funeral of Mother, Father, Brothers, Sisters, Spouse, Children, Grandmother, Grandfather, Mother-in-Law, Father-in-Law, Step-children living in the home of the employee, and step parents, up to three days.

It is understood that payment will not be made for holidays, vacations, weekends, etc.

SECTION 27
SICK LEAVE PAY

A. 1) Employees who have had at least twelve (12) months of active service with the Company immediately preceding October 5, 1970, are entitled to a maximum of six (6) sick leave days without loss of pay, subject to the conditions specified herein.

Employees who had less than one year but more than six months continuous service with the Company, imme-

diately preceding October 5, 1970, or his anniversary date which ever [*sic*] is appropriate will be entitled to one such sick leave day for each 172 hours of work.

2) Effective October 5, 1971 or the employees anniversary date if appropriate and each subsequent October 5, or the employees anniversary date if appropriate an employee will be entitled to one (1) sick leave day without loss of pay for each 172 hours worked in the preceding twelve months, but in no event will an employee be credited for more than six (6) paid sick leave days during such a period.

B. Unused sick leave days are cumulative from one twelve months period (October 5 to October 5, or the anniversary date if appropriate) to another, but the maximum paid sick leave days to which an Employee may be entitled, at the beginning of any appropriate twelve (12) months period, is twenty-four (24). No paid sick leave days are convertible to cash.

C. Sick leave pay is subject to the following conditions:

1) To be entitled to sick leave pay, an employee must be physically disabled to such an extent that he is prevented from working his entire shift. Maternity leave is not considered sick leave.

2) For each period of disability, as defined herein, an employee will not be entitled to sick leave pay for the first two working days lost. However, if the employee submits a medical certificate for a reputable medical doctor for each day of absence, sick leave pay will commence the first day lost. Too, if an employee is confined to a hospital because of illness or if the disability is the result of an accident, sick leave pay will commence the first work day lost following admission to the hospital and/or following the accident.

3-a) An employee who is absent for more then three (3) consecutive work days must substantiate such disability by presenting a medical certificate to the Company from a reputable medical doctor.

b) Although a medical certificate will not be required for absence up to and including three (3) work days, the employee must submit reasonable proof of his illness. During the first three (3) days of such absence, the Company may require the employee to submit to a medical examination, at the expense of the Company, to determine proof of disability.

4) An employee who is unable to report to work because of disability will be considered as being absent without just cause, if he does not report his inability to work within a reasonable time prior to his scheduled shift or as soon as practicable.

D. An employee who fraudulently applies for sick leave will be discharged from the Company's employment. If the Company elects not to discharge the employee, the employee will be subject to a disciplinary layoff and/or be required to forfeit sick leave pay up to a maximum of six (6) days.

E. A day of sick leave will be calculated by multiplying eight (8) hours by the employees regular classified wage rate.

F. The Sick Leave Pay Section does not prejudice or abrogate any management right to any of the provisions of the Agreement.

G. An employee entitled to either a Workman's Compensation Benefit or a State Disability Benefit in addition to sick leave pay shall be entitled only to that amount of a days sick leave pay which together with the Workmans Compensation Benefits, or State Disability Benefit equals his eight hour straight time earnings. Such unused sick leave time will be credited to the employees record subject to the provision of Section "B" of this Section.

MEMORANDUM OF AGREEMENT

It is understood that sick leave pay entitlement as provided in Section 27 of the Agreement between the parties is dependent under certain specified conditions upon submission of a medical certificate from a "reputable medical doctor" as provided in Subsection D of said Section 27. However without prejudice to such requirement, sick leave may be granted when a certificate is submitted by other than a Medical Doctor, such as from a D.D.S. or an optometrist and where it is established that the employee's physical condition was such that work could not be performed on the day in question and where the examination or treatment could not have been performed during non-working hours.

It is further understood that pursuant to Section 27 (C) (1) granting of sick leave pay under no circumstances will be granted for routine medical, eye or dental examinations.

SECTION 28
COMPANY PROMOTIONS

It is the policy of the Company to promote from within. When an employee desires a better job assignment or a different shift assignment, he will so apply to the Company in writing. When a job or shift vacancy occurs the Company will consider such appropriate applications on file at the time. In making the assignment, the Company will consider the applicant's seniority, and his ability to fulfill the requirements of the position available.

SECTION 29
SUPERVISORS

Supervisors who are exempt from the bargaining unit shall not perform work done by those they supervise except supervisors may perform bargaining unit work: (1) in emergencies, (2) when it is necessary to correct and/or avoid an interruption of production, (3) to instruct, (4) to experiment, and (5) for the purpose of research and development for improved production and manufacturing methods. An emergency exists when (1) the Employer is unable to obtain bargaining unit employees to perform the work, and (2) when there is a threat to property or the health of employees.

SECTION 30
WAGE CONTROLS

Increased economic benefits provided by this Agreement will be applied only if they are permitted by

legislation, Executive orders, or regulations involving wage and benefit control.

SECTION 31
TERM OF AGREEMENT

This Agreement, including Exhibit "A" shall be enforced and remain in effect from the Sixth (6) of October, 1974, and shall be considered self-renewing for yearly periods thereafter unless notices filed by either party with the other part, in writing, to change or alter at least sixty (60) days prior to the fifth (5) day of October, 1977. If either party serves such notice, both parties may suggest changes.

WAGES

APPENDIX "A" attached hereto reflects general wage increases effective October 6, 1974, November 9, 1975 and October 3, 1976, in the amounts of 10%, 8% and 9% respectively for all job classifications.

s/ ANTHONY RODRIQUEZ 9/25/74
FOR THE EMPLOYER

s/ CLAYTON (MICKEY) HAYES 9/25/74
FOR THE UNION

APPENDIX "A"
WAGE RATES

CLASSIFICATION	Rate Effective 10/6/74	Rate Effective 11/9/75	Rates Effective 10/3/76
General Work - "B"			
1st 3 months	3.30	3.56	3.88
Next 6 months	3.56	3.84	4.19
2nd 6 months	3.73	4.03	4.39
3rd 6 months & thereafter	4.00	4.32	4.71
General Work - "A"			
Mail Sorter			
1st 3 months	3.88	4.19	4.57
Next 6 months	4.27	4.61	5.02
Thereafter	4.44	4.80	5.23

CLASSIFICATION	Rate Effective 10/6/74	Rate Effective 11/9/75	Rates Effective 10/3/76
Duplicator Operator			
1st 3 months	3.50	3.78	4.12
Next 6 months	3.75	4.05	4.41
2nd 6 months	3.92	4.23	4.61
3rd 6 months & thereafter	4.18	4.51	4.92
Maintenance Man			
1st 3 months	4.28	4.62	5.04
Next 6 months	4.64	5.01	5.46
2nd six months	4.87	5.26	5.73
3rd six months	5.31	5.73	6.25
4th six months	5.41	5.84	6.37
5th six months & thereafter	5.57	6.02	6.56

CLASSIFICATION	Rate Effective 10/6/74	Rate Effective 11/9/75	Rates Effective 10/3/76
Paper Cutter 29" and over			
1st 3 months	4.09	4.42	4.82
Next six months	4.54	4.90	5.34
2nd six months	4.84	5.23	5.70
3rd six months	5.18	5.59	6.09
4th six months	5.49	5.93	6.46
5th six months	5.83	6.30	6.87
Thereafter	6.15	6.64	7.24
Paper Cutter under 29"			
1st 3 months	3.88	4.19	4.57
Next six months	4.27	4.61	5.02
Thereafter	4.44	4.80	5.23

Employees designated as leadmen or leadwomen shall receive $.13 per hour in excess of the above day rates.

APPENDIX "A"
WAGE RATES

CLASSIFICATION	Rate Effective 11/9/75	Employee Hired after 3/8/76	Rates Effective 10/3/76 Employee Hired prior to 3/8/76	Rates Effective 10/3/77
General Work - "B"				
1st 3 months	3.56	3.56	3.88	3.88
Next 6 months	3.84	3.84	4.19	4.19
2nd 6 months	4.03	4.03	4.39	4.39
3rd 6 months & thereafter	4.32	4.72	4.72	5.11
General Work - "A"				
Mail Sorter				
1st 3 months	4.19	4.19	4.57	4.57
Next 6 months	4.61	4.61	5.02	5.02
Thereafter	4.80	5.23	5.23	5.67

CLASSIFICATION	Rate Effective 11/9/75	Employee Hired after 3/8/76	Rates Effective 10/3/76 Employee Hired prior to 3/8/76	Rates Effective 10/3/77
Duplicator Operator				
1st 3 months	3.78	3.78	4.12	4.12
Next 6 months	4.05	4.05	4.41	4.41
2nd 6 months	4.23	4.23	4.61	4.61
3rd 6 months & thereafter	4.51	4.92	4.92	5.34
Maintenance Man				
1st 3 months	4.62	4.62	5.04	5.04
Next 6 months	5.01	5.01	5.46	5.46
2nd six months	5.26	5.26	5.73	5.73
3rd six months	5.73	5.73	6.25	6.25
4th six months	5.84	5.84	6.37	6.37
5th six months & thereafter	6.02	6.56	6.56	7.12

CLASSIFICATION	Rate Effective 11/9/75	Employee Hired after 3/8/76	Rates Effective 10/3/76 Employee Hired prior to 3/8/76	Rates Effective 10/3/77
Paper Cutter 29" and over				
1st 3 months	4.42	4.42	4.82	4.82
Next six months	4.90	4.90	5.34	5.34
2nd six months	5.23	5.23	5.70	5.70
3rd six months	5.59	5.59	6.09	6.09
4th six months	5.93	5.93	6.46	6.46
5th six months	6.30	6.30	6.87	6.87
Thereafter	6.64	7.24	7.24	7.86
Paper Cutter under 29"				
1st 3 months	4.19	4.19	4.57	4.57
Next six months	4.61	4.61	5.02	5.02
Thereafter	4.80	5.23	5.23	5.62

NATIONAL LABOR RELATIONS BOARD
Case No. 32-CA-3160

ADDENDUM TO AGREEMENT

Litton Financial Printing, Santa Clara, California Plant and the Printing Specialties and Paper Products Union Local 777, affiliated with District Council No. 1, and a subsidiary of the International Printing Graphics Communications Union of North America hereby agree to amend their Agreement effective October 6, 1974, as follows.

1) Section 11 — Vacations

Add the following to Section 11(A).

Employees hired on or after March 8, 1976, will be entitled to the following vacation provided they have worked at least 1500 hours in the preceding calendar year. Employees with one (1) year of continuous service will be entitled to one (1) week vacation with pay. Employees with two (2) years of continuous service will be entitled to two (2) weeks vacation with pay. Employees with three (3) years of continuous service will be entitled to three (3) weeks vacation with pay.

Amend Section 11(B) as follows.

Employees who at the beginning of the year have not worked a total of 1500 hours in the preceding year will be entitled to pro rata vacation as follows: Employees who have at least one (1) year of continuous service at the beginning of the year will be entitled to a pro rata vacation in an amount equivalent to two percent (2%) of the total hours they did work. Employees who at the beginning of the vacation year have two (2) years

of continuous service will be entitled to a pro rata vacation in an amount equivalent to four percent (4%) of the total hours they did work. Employees who at the beginning of the vacation year have three (3) years or more of continuous service will be entitled to a pro rata vacation in an amount equivalent to six percent (6%) of the total hours they did work. Hours which do not equal a full day (eight hours) will be paid for in cash and in lieu of time away from work.

Amend Section 11(D) as follows.

Should an employee who has qualified for a vacation in accordance with Section A above leave the Employer, he shall be entitled to a vacation on the basis of 2.3 hours per week in which he has worked not less than six percent (6%) of the straight time hours for his scheduled shift, if he qualifies for three (3) weeks vacation in accordance with (A) above. If he qualifies for either one or two weeks in accordance with (A) above, he will be entitled to either .77 or 1.15 hours pay per week in which he has worked not less than six percent (6%) of the straight time hours for his shift in the week, as the case may be.

2) Section 22 — Health and Welfare

Amend Section 22 by adding as a third paragraph:

Subsequent to October 3, 1977, if the Trust determines that the current Company contribution per month per employee is insufficient to maintain current plan benefits, the Company will be subject to and agrees to increase its contribution by the amount necessary to maintain current benefits at a rate of and at the time that the majority of

employers under contract with District Council No. 1 are paying said increased amount.

3) Section 23 — Retirement

Amend Section 23 by adding the following as a third paragraph:

Effective September, 1978, the employer's contribution to said retirement plan will be $28.87 per employee per month.

4) Section 31 — Term of Agreement

Amend Section 31 as follows.

This Agreement shall become effective from October 6, 1974, and should remain in effect through October 3, 1978, and should be automatically renewed from year to year thereafter unless either party serves written notice on the other party by registered mail at least ninety (90) days before any annual expiration date of its intention to terminate the Agreement or negotiate any changes in the Agreement. If the parties are unable to reach an accord or a complete amended Agreement thirty (30) days prior to the expiration date of the Agreement, they shall jointly enter into a stipulated agreement to arbitrate unresolved issues in accordance with the following procedure and rules:

A. A tripartite arbitration board is hereby authorized to hear, consider and determine the basis of settlement of the unresolved issues referred to by the parties.

   1. The Union shall appoint one member to the board and the Company shall appoint one member to the board. The Union and the Company board members shall mutually select the third member of the

board who shall act as the impartial chairman. In the event the Union and the Company board members are unable to agree upon the third member, they shall jointly request the American Arbitration Association to submit a panel of arbitrators whom they shall select as the third member. The impartial third member shall act as chairman of the tripartite board.

2. The board shall convene as frequently as necessary to hear evidence and argument.

3. Upon hearing all evidence and argument, the Board shall commence to determine the basis of settlement for amended agreement.

4. In any instance where the Board cannot agree, the impartial chairman shall decide.

5. (a) The issue(s) which the Board is authorized to consider will be reduced to writing and executed by all Board members. Only those issues which have been submitted for negotiations by the parties and upon which no agreement has been reached at the time this arbitration is invoked, may be included among the issues for the Board to consider. Proposals on the included issues by either party to resolve issues made during the negotiation but which were not accepted will not be

submitted to the impartial chairman; only the issue will be submitted.

(b) By mutual agreement and so executed in writing, the parties may elect at least thirty (30) days prior to the termination of the Agreement the following in lieu of the procedure so outlined in (a) above in this Paragraph "5": If the parties are unable to agree upon a complete agreement thirty (30) days prior to the expiration date of this Agreement, the last offer of each party to reach a full agreement will be submitted to the arbitration panel. The panel will then rule if either the Company's offer or the Union's offer should be the basis of settlement for the Agreement. The panel will have no authority to alter the proposals but merely select which offer should be the basis of the Agreement.

5) Section 32 — Wages

APPENDIX "A" attached hereto reflects general wage increases effective October 6, 1974, November 9, 1975, October 3, 1976, and October 3, 1977.

For the Company:	For the Union:
/s/ L. R. Libhart	/s/ Clayton (Mickey) Hayes

Date signed April 22, 1976

APPENDIX "A"
WAGE RATES

CLASSIFICATION General Work - "B"	Rate Effective 11/9/75	Employee Hired after 3/8/76	Rates Effective 10/3/76 Employee Hired prior to 3/8/76	Rates Effective 10/3/77
1st 3 months	3.56	3.56	3.88	3.88
Next 6 months	3.84	3.84	4.19	4.19
2nd 6 months	4.03	4.03	4.39	4.39
3rd 6 months & thereafter	4.32	4.72	4.72	5.11
General Work - "A" Mail Sorter				
1st 3 months	4.19	4.19	4.57	4.57
Next 6 months	4.61	4.61	5.02	5.02
Thereafter	4.80	5.23	5.23	5.67

CLASSIFICATION	Rate Effective 11/9/75	Employee Hired after 3/8/76	Rates Effective 10/3/76 Employee Hired prior to 3/8/76	Rates Effective 10/3/77
Duplicator Operator				
1st 3 months	3.78	3.78	4.12	4.12
Next 6 months	4.05	4.05	4.41	4.41
2nd 6 months	4.23	4.23	4.61	4.61
3rd 6 months & thereafter	4.51	4.92	4.92	5.34
Maintenance Man				
1st 3 months	4.62	4.62	5.04	5.04
Next 6 months	5.01	5.01	5.46	5.46
2nd six months	5.26	5.26	5.73	5.73
3rd six months	5.73	5.73	6.25	6.25
4th six months	5.84	5.84	6.37	6.37
5th six months & thereafter	6.02	6.56	6.56	7.12

CLASSIFICATION	Rate Effective 11/9/75	Employee Hired after 3/8/76	Rates Effective 10/3/76 Employee Hired prior to 3/8/76	Rates Effective 10/3/77
Paper Cutter 29" and over				
1st 3 months	4.42	4.42	4.82	4.82
Next six months	4.90	4.90	5.34	5.34
2nd six months	5.23	5.23	5.70	5.70
3rd six months	5.59	5.59	6.09	6.09
4th six months	5.93	5.93	6.46	6.46
5th six months	6.30	6.30	6.87	6.87
Thereafter	6.64	7.24	7.24	7.86
Paper Cutter under 29"				
1st 3 months	4.19	4.19	4.57	4.57
Next six months	4.61	4.61	5.02	5.02
Thereafter	4.80	5.23	5.23	5.62

Press Operator (Hot Type)		Rates Effective 11/9/75	Rates Effective 10/3/76	Rates Effective 10/3/77
1st 3 months	80%	4.16	4.53	4.91
2nd 3 months	85%	4.42	4.81	5.22
Next 6 months	90%	4.68	5.09	5.53
Thereafter		5.20	5.66	6.14
Intertype Operator				
1st 6 months	70%	4.20	4.58	4.92
2nd 6 months	75%	4.50	4.91	5.33
3rd 6 months	80%	4.80	5.23	5.68
4th 6 months	85%	5.10	5.56	6.03
5th 6 months	90%	5.40	5.89	6.39
6th 6 months	95%	5.70	6.21	6.75
Thereafter		6.00	6.54	7.10

Cut Boy	Rates Effective 11/9/75	Rates Effective 10/3/76	Rates Effective 10/3/77
1st 3 months	3.56	3.56	3.88
Next 6 months	3.84	3.84	4.19
2nd 6 months	4.03	4.03	4.39
3rd 6 months & thereafter	4.32	4.72	5.11

Employees designated as leadmen or leadwomen shall receive $.13 per hour in excess of the above day rates.

NATIONAL LABOR RELATIONS BOARD
Case No. 32-CA-3160

[Logo and union byline omitted in printing]
2267 TELEGRAPH AVENUE, OAKLAND,
CALIFORNIA 94612 (415) 451-0309

RETURN RECEIPT REQUESTED
CERTIFIED NO. P05 7485628

September 24, 1980

Mary Arnold
Plant Manager
Litton Financial Printing
2260 De La Cruz Boulevard
Santa Clara, California 95050

Re: Grievance Nos. 3251, 3252, 3253, 3254, 3255, 3256, 3257, 3258, 3259 and 3260

Dear Ms. Arnold,

The aforementioned grievances have been filed on behalf of those employees laid off out of seniority, to wit: Gerda Brosig, Jean Ceccato, Mildred Baker, Terri Marquez, Helen Soto, Catherine Kliec, Claire Lundegard, Gloria Hernandez, Eileen Mueller and Carmen Mata.

The Union hereby requests that the Company meet with our representative to discuss this layoff and its impact on these senior people, and requests that pending resolution of this matter, that each and all of them be reinstated to their employment.

Sincerely,
/s/ Marilyn Major
Marilyn Major
Business Representative

MM:jo
dcl
cc: David Rosenfeld

NATIONAL LABOR RELATIONS BOARD
Case No. 32-CA-3160

VAN BOURG, ALLEN, WEINBERG & ROGER
A PROFESSIONAL CORPORATION
875 BATTERY STREET
SAN FRANCISCO CALIFORNIA 94111
TELEPHONE (415) 864-4000
[Attorney names and other addresses omitted in printing]

November 10, 1980

M. J. Diederich, Esq.
Litton Financial Printing
360 North Crescent Drive
Beverly Hills, CA 90210

Re: Litton Financial Printing, Santa Clara

Dear Mr. Diederich:

Marilyn Major has forwarded to me your letter of November 3, 1980 for response.

Your self-serving statement which appears in the second paragraph is rejected. You obviously knew that the Union was requesting *both* the utilization of the grievance-arbitration procedure and a meeting to discuss both the decision to lay off the workers and the effects upon those employees. It is, however, apparent that your decision to lay these employees off was a *fiat accompli* as of the date the layoffs were effected.

In any case, the Union is willing to meet with you at your earliest convenience in order to discuss these layoffs. We once again assert our right to grieve and to submit if necessary to binding arbitration these layoffs as we feel they are directly in contravention of the

principles in the Collective Bargaining Agreement which still governs the relationship between Printing Specialties and Litton.

In any case, please supply us the following information so that we may effectively discuss and/or grieve these layoffs:

(1) The name of each employee laid off within the last year.

(2) The seniority dates, dates of hire and classifications of each employee listed above.

(3) Any internal reports or studies which mention, concern or relate to the reasons for the layoffs.

(4) Any economic forecasts which relate to these layoffs or the possibility of rehire.

Upon receipt of this information, Ms. Major will contact you in order to set up a meeting so that this discussion may occur. Please be advised that we consider your willingness now to meet to discuss these layoffs a recognition of Printing Specialties and District Council No. 1 continues to be the collective bargaining representative of your employees in the unit previously recognized.

Sincerely,

/s/ David A. Rosenfeld
DAVID A. ROSENFELD

DAR/po
ope-3 (1)

cc: Ms. Marilyn Major, District Council No. 1
Mr. Gary Dunmire, District Council No. 1

NATIONAL LABOR RELATIONS BOARD
Case No. 32-CA-3160

LITTON INDUSTRIES
360 North Crescent Drive
Beverly Hills, California 90210 213 273-7860

November 3, 1980

Ms. Marilyn Major, Business Representative
Printing Specialties & Paper Products Union
District Council No. 1
2267 Telegraph Avenue
Oakland, California 94612

Re: Litton Financial Printing Santa Clara

Dear Ms. Major:

In going through some old mail today, I came across your letter of September 24 and read it again.

It appears to me to be ambiguous. When I first replied to it on October 3, I viewed it as a request to utilize the grievance-arbitration provisions of the expired contract.

Upon reading it again, I can see where you might have also been requesting a meeting to discuss the effects of the layoffs mentioned in your letter. If that was your intent, I have no objection to such a meeting. Please call me if you wanted to arrange a discussion.

Very truly yours,
/s/ M. J. Diederich
M. J. Diederich
Attorney for
Litton Financial Printing

MJD:md
cc: Mary Arnold
Litton Financial Printing
Santa Clara

NATIONAL LABOR RELATIONS BOARD
Case No. 32-CA-3160

Seniority List — August 26, 1980

EMPLOYEE NAME	HIRE DATE	DEPARTMENT
A. Mendez	10/31/60	Bindery
C. Cordova	4/20/61	Typing
G. Brosig	12/6/61	Cutter
J. Ceccato	6/4/62	Press
P. Eddy	8/19/64	Press
M. Baker	8/24/64	Proofer
F. Oyer	10/19/64	Bindery
T. Marquez	8/11/65	In Mail
P. Mears	12/4/67	Press
H. Soto	1/16/68	Addressograph
C. Klier	3/4/68	Typing
C. Valencia	11/20/68	Bindery
M. Johnston	3/12/69	Cutter
C. Pecci	5/6/69	Bindery
G. Gallegos	9/8/69	Press
B. Mangan	9/9/69	Typing
L. Smith	9/25/69	Typing
C. Lundegard	6/7/71	Typing
B. Buranek	9/7/71	Press
T. Larsen	8/23/72	Hot Type
E. Schurpf	9/26/73	Press
B. Feder	10/20/75	Typing
H. Busch	3/29/76	Inter Type
E. Najar	4/19/76	Hot Type
L. Guzman	6/21/76	Press
G. Hernandez	8/11/76	Bindery
R. Villagomez	8/25/76	In Mail
D. Erickson	9/13/76	Typing
L. Stockdale	9/16/76	Bindery

EMPLOYEE NAME	HIRE DATE	DEPARTMENT
R. Taamai	10/4/76	Proofer
E. Moeller	6/9/77	Addressograph
S. McDougall	6/21/77	Stock
P. Busch	7/21/77	Out Mail
C. Mata	11/10/77	Bindery
N. Levao	7/13/78	Bindery
W. Osborn	3/1/79	Hot Type
M. Velasco	8/6/79	Hot Type
A. Pena	9/24/79	Bindery
R. Pena	10/23/79	Out Mail
G. McHenry	11/26/79	Mechanic
R. Navarette	3/5/80	Night Wash Up
J. Arteaga	5/19/80	Cut Boy

NATIONAL LABOR RELATIONS BOARD
Case No. 32-CA-3160

LITTON FINANCIAL PRINTING
2260 De la Cruz Boulevard
Santa Clara, California 95050 408 727-3262
September 4, 1980

Gates, McDonald & Company
P. O. Box 1944
Columbus, Ohio 43216

Dears Sirs,

Following information is a separation report for listed personnel.

Name	S.S. #	Date Hired	Date Seperated	Vacation Pay	Severance Pay
Jean Ceccato	561-38-2543	6/4/62	9/2/80	498.30	2,559.80
Mildred Baker	544-07-9387	8/24/64	8/29/80	395.53	2,253.40

Name	S.S. #	Date Hired	Date Seperated	Vacation Pay	Severance Pay
Teresa Marquez	572-54-7536	8/11/65	8/29/80	951.77	2,134.80
Catherine Klier	567-03-4430	3/4/68	8/29/80	809.45	1,779.00
Claire Lundegard	556-01-8427	6/7/71	8/29/80	619.69	1,423.20
Gloria Hernandez	564-74-3738	8/11/76	8/29/80	667.13	830.20
Eileen Moeller	555-12-7822	6/9/77	8/29/80	829.92	711.60
Helen Soto	548-46-5458	1/16/68	9/2/80	524.81	1,779.00
Carmen Mata	547-02-5583	11/10/77	8/29/80	415.69	711.60
Raul Navarette	560-35-8420	3/5/80	8/29/80	0	N/A
Brosig		12/6/61	8/29/80 9/2/80		3,830.40

NATIONAL LABOR RELATIONS BOARD
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[SELECTED PAGES OF TRANSCRIPT OF HEARING]

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* * * *

identification is the addendum to stated agreement. Which is a five page document which by its terms runs from October 6, 1974 to October 3, 1978 —

JUDGE LITVACK: You said 74 to 78?

MS. MILOWICKI: That's right. It's an addendum that we were talking about. It runs from 1974 to 1978. And it's marked for identification as General Counsel's No. 3.

(The documents referred to were marked for identification as General Counsel's Exhibits Nos. 2 and 3.)

MS. MILOWICKI: At this time, I'd like to propose a stipulation that the items marked for identification as General Counsel's 2 and 3 were the collective bargaining agreements in effect until October of 1978, and then because there was no timely reopener, in October of 1978, the same documents that have already been marked for identification, they were automatically renewed until October of 1979.

MR. DIEDERICH: So stipulated.

MS. MILOWICKI: I would like to propose the stipulation that the documents marked as General Counsel's 2 and 3 are authentic and move them into evidence.

MR. ROSENFELD: No objection.

JUDGE LITVACK: Mr. Diederich?

MR. DIEDERICH: No objection.

* * * *

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* * * *

1979. But due to the hearings and so on and all the decisions issuing, that's an issue.

JUDGE LITVACK: Okay. Does anyone have anything preliminary before we take evidence?

Ms. Milowicki?

MS. MILOWICKI: No, Your Honor.

JUDGE LITVACK: Mr. Rosenfeld?

MR. ROSENFELD: No, Your Honor.

JUDGE LITVACK: Mr. Diederich?

MR. DIEDERICH: NO.

JUDGE LITVACK: Okay. Why don't you call your first witness?

MS. MILOWICKI: The General Counsel calls to the stand Ms. Marilyn Major.

Whereupon,

MARILYN MAJOR

having been first duly sworn, was called as a witness herein, and was examined and testified as follows.

JUDGE LITVACK: Please be seated and state your full name and address for the record.

THE WITNESS: Marilyn Major, 1777 Shoreline Drive, Alameda.

DIRECT EXAMINATION

BY MS. MILOWICKI:

Q Ms. Major, do you have a position with Printing

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Specialties and Paper Products Union?

A Yes.

Q What is your position?

A I'm a business representative.

Q How long have you held that position?

A Approximately two and a half years.

Q Do you have any responsibilities with regard to Litton Industries?

A Yes, I do, I'm the representative assigned to represent the membership at that plant.

Q How long have you had that duty?

A Since about April or May of 1979, I believe.

Q And were you the representative in August of 1980?

A Yes, I was.

Q Do you continue to be the representative?

A Yes, I am.

Q Were you ever notified by anyone from Litton Management that the employees on whose behalf you filed the grievances were going to be laid off before those layoffs actually occurred?

A No, I was not.

JUDGE LITVACK: Don't — Ms. Milowicki, don't skip around. There's no evidence in the record of any grievances other than a letter, so —

MS. MILOWICKI: There's documents —

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JUDGE LITVACK: Yeah, I know. But I can understand the document, but — don't jump ahead of the testimony. It makes the record unclear when you do that.

BY MS. MILOWICKI:

Q Were you ever notified by anyone from Litton management that these layoffs were going to occur?

A No, I was not.

Q How did the layoffs come to your attention?

A Through telephone calls from the laid off employees.

Q Did you subsequently file grievances on behalf of those employees that were laid off?

A Yes, I did. The grievances were filed by the steward at my instruction.

MS. MILOWICKI: I have no further questions of this witness.

(Pause.)

MR. ROSENFELD: Your Honor, may I examine the witness briefly?

JUDGE LITVACK: Yeah, wait a second.

(Pause.)

Go ahead.

DIRECT EXAMINATION

BY MR. ROSENFELD:

Q At the time the layoffs occurred, was any other agent of the Union assigned to handle matters at Litton?

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A There were two other representatives that had been assigned and I don't believe that assignment had ever been withdrawn, but at that particular time, I was the only representative actively handling the plant.

Q To your knowledge, was anyone else in the Union notified of the layoffs prior to the layoffs?

A No.

Q To your knowledge, the Union was not notified of the layoffs prior to the layoffs?

A No, that's true.

MR. ROSENFELD: I have nothing further.

MR. DIEDERICH: Did the witness submit an affidavit?

MS. MILOWICKI: Yes, Your Honor.

MR. DIEDERICH: Could I have it, please?

MS. MILOWICKI: Let the record reflect that I am showing Counsel for Respondent a two page document

that's an affidavit of the witness taken on November 4, 1980.

JUDGE LITVACK: Let's take a ten minute recess. Off the record.

(Whereupon, a short recess was taken.)

JUDGE LITVACK: On the record.

Just so I understand what your legal position is on the obligation to at least process the grievances, is it your position that you have no legal obligations — assuming now that — putting aside your contention that the Union is not

* * * *

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* * * *

lend some meaning toward the agreement.

JUDGE LITVACK: Her understanding doesn't — of the provision is irrelevant. The document does speak for itself. On the other hand, grievances were filed because of these layoffs. Perhaps you want to get at it another way. I mean, ask her what the basis of the grievances were.

BY MR. DIEDERICH:

Q Let me ask — let me withdraw that question. You told us that you instructed the steward to file some grievances?

A That's true.

Q Who was that steward?

A Linda Stockdale.

Q And you instructed her over the telephone?

A Yes, I did.

Q What did you tell her?

A I told her to file grievances on behalf of the employees who had been laid off, to present them to the Company on the standard grievance forms, and that I would be following that presentation with a letter verifying the fact that the grievances were considered filed by the Union.

JUDGE LITVACK: Well, did Ms. Stockdale ever file the grievances, or was your letter dated September 24th the filing of the grievances?

THE WITNESS: Ms. Stockdale did file the grievances. However, the Company was refusing at that time to accept

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grievances from the steward, so my letter was follow up to document the fact that the grievances had been filed.

BY MR. DIEDERICH:

Q All right. Let me retrace that now. You instructed her on the telephone to prepare some grievances on the standard grievance form. And did she do that?

A Yes, she did.

Q Did she subsequently give those prepared grievance forms to you?

A So she informed me.

Q Pardon?

A So she did inform me, yes.

MR. ROSENFELD: No, wait a minute.

BY MR. DIEDERICH:

Q Did she give you the grievance forms which she had prepared?

A She sent me the Union's copy of the grievance forms.

Q And did you review them at that time?

A Yes, I did.

Q And did you then return and transmit those to the Company on September 24, with a letter?

A Yes, I did.

Q Did you — there were separate grievance forms for each employee?

A Yes, that's true.

* * * *

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* * * *

under the provisions in the contract.

Q As a matter of fact, when you filed the grievances with the Company on September 24 which Linda Stockdale had prepared at your instruction, wasn't the only objection that you raised was the fact that these people had been laid off out of seniority?

A That was the primary concern. Also to the fact that the people had been given no opportunity to bump into other employment within the plant. Also that there had been no notification.

Q That would have related to —

JUDGE LITVACK: Just —

MR. DIEDERICH: Excuse me, I'm sorry. I didn't mean to interrupt you. Go ahead and repeat that, so the reporter gets it.

THE WITNESS: That the people had been laid off out of seniority, that they had been given, to my knowledge, no opportunity to bump into other positions within the plant, and that the Union had not been given any notification of the layoffs.

BY MR. DIEDERICH:

Q And your understanding that the Company had the right to lay people off, that was derived, was it not, simply from reading the contract and conversations you had when you became business agent or business representative?

A I believe that's an accurate statement, yes.

JUDGE LITVACK: Well, when you say the Company had the

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right to lay people off, is that an unqualified right, or was there qualifications to it?

THE WITNESS: Qualifications with reference to the stipulations that exist in the contract as to how layoffs were to take place.

JUDGE LITVACK: Okay.

BY MR. DIEDERICH:

Q In other words, as long as they gave the appropriate day notice, and followed seniority, then the Company would have been in compliance as far as you're concerned?

A That is an incomplete statement but the —

Q Then you complete it for me, would you, please.

A Okay. In the terms of observing the seniority rights of the employees involved in the layoff situation which would have to do with review of their qualifications for movement into other existing jobs within the facility, and observance of their seniority in terms of the other people retained in the jobs that they had been performing. These would be the elements that I would be concerned with in evaluating whether or not a layoff justified a grievance on the part of the individual laid off.

MR. DIEDERICH: I have no more questions, thank you.

JUDGE LITVACK: Any redirect?

MS. MILOWICKI: I don't have anything, Your Honor.

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REDIRECT EXAMINATION

BY MR. ROSENFELD:

Q Ms. Major, were you given — by you, I mean the Union, an opportunity to discuss these layoffs with the Employer?

A No, I was not.

Q Were you given an opportunity to discuss the effects of these layoffs on the employees?

A With the Employer, no, I was not.

JUDGE LITVACK: Could we have a time period for these questions, Mr. Rosenfeld?

BY MR. ROSENFELD:

Q At any time.

A No, I was not. At no time.

Q Were there other employees still working in the plant after the employees that are the subject of this matter were laid off?

A Yes, there were.

MR. ROSENFELD: I have nothing further.

RECROSS EXAMINATION

BY MR. DIEDERICH:

Q Ms. Major, it's your testimony that you were not given an opportunity to discuss with the Company the effects of the layoff?

A Oh, okay, I beg your pardon. I recall an exchange of letters in which the grievance was filed, the grievances were

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filed, the Company responded with a letter stating in effect that the Company was not liable to respond to the grievance procedure, followed at some time subsequent thereto, several weeks subsequent thereto by — it might even have been longer, I really, the time sequence is a little confused right now, — but there was another letter at some point subsequent thereto stating that in going through some old papers, the Company had found my letter requesting the opportunity to discuss the matter with the Company regarding the layoffs. And I responded to that letter that I would refer the matter to our attorney and the Company would be contacted by our attorney.

Q And did you refer that letter to your attorney?
A Yes, I did.
Q And who was that?
A David Rosenfeld of Victor Van Bourg's firm.
Q So you were advised at some point in time, particularly when you received that letter from the Company, that the Company was willing to meet and discuss with you the effects of the layoff, is that not right?
A That is true, yes.
Q Were you not also offered, or was there not also a suggestion that if you wanted to have such a meeting that you contact the Company and set up such a meeting?

MR. ROSENFELD: Your Honor, it's clear from the testimony up to this point that that offer, if any, was —

* * * *

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* * * *

MR. ROSENFELD: No objection.

JUDGE LITVACK: All right. I'll grant that motion to strike Paragraph 11(b) from the Complaint.

Do you have any further witnesses, Ms. Milowicki?

MS. MILOWICKI: No, Your Honor.

JUDGE LITVACK: Mr. Rosenfeld, do you have any witnesses?

MR. ROSENFELD: May I have just a moment?

JUDGE LITVACK: Certainly.

(Pause.)

JUDGE LITVACK: Are you resting your case then?

MS. MILOWICKI: Yes, Your Honor.

JUDGE LITVACK: Mr. Rosenfeld, do you have any witnesses?

MR. ROSENFELD; Mary Arnold.

Wherupon, [*sic*]

MARY ARNOLD

having been first duly sworn, was called as a witness herein, and was examined and testified as follows.

JUDGE LITVACK: Have a seat and state your full name and address for the record.

THE WITNESS: Mary Eileen Arnold, 552 San Jose Avenue, Germaine, California.

DIRECT EXAMINATION

BY MR. ROSENFELD:
Q Ms. Arnold, in 1980, were you employed by Litton Financial Printing?

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A Yes, I was.
Q In what capacity?
A As plant manager, Santa Clara plant.
Q And were you involved in the layoffs of the employees involved in this proceeding?
A Yes, I was.
Q The employees that were laid off, were they part of any department at the facility? At the plant?
A Any department?
A Yes. What department did they work in?
A Various departments.
Q And how many various departments?
A All that are attached to the plant.
Q How many departments are there?
A Bindery, typing, press, operators, with the exception of hot type area.

JUDGE LITVACK: Mr. Rosenfeld, I'm sorry. I didn't get what your occupation is. You work for — who do you wōrk for?

THE WITNESS: Litton Financial Printing.

JUDGE LITVACK: As what?

THE WITNESS: At the present time, I'm a project analysist [*sic*].

JUDGE LITVACK: Thank you.

BY MR. ROSENFELD:

Q The departments in the plant were bindery, press and what else?

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A Typing, in mail.
Q Is cutter a department?
A No.
Q Is inter-type a department?
A No.
Q So the three departments are bindery, press and typing?
A There's also a hot type area. Or department.
Q Was there some economic reason for the layoffs of the people involved in this?
A Yes.
Q And what was that economic reason?
A Well, there were two methods of producing checks in the plant at the time. One's called cold type; the other one's called hot type. The cold type operation — the quality of the product that we can produce at this point in time is no longer acceptable to banks, and cold type operation was and is being phased out in favor of the hot type operation.

JUDGE LITVACK: Excuse me, I realize there's no objection to this, but what is this testimony going to? The employee has not — there is nothing in the Complaint about the validity of the grievance.

MR. ROSENFELD: I know, but, Your Honor, I asked the question earlier to whether the Employer had an obligation to bargain over layoffs. And I think that

the record ought to reflect the nature of the layoffs. For that reason.

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JUDGE LITVACK: This testimony is not going to the validity of the grievance?

MR. ROSENFELD: No.

JUDGE LITVACK: Okay.

BY MR. ROSENFELD:

Q And the ten people that were laid off were laid off as a result of the gradual change from cold type to hot type?
A That's correct.
Q Now, when did you begin changing from cold type to hot type in that plant? Well, let me rephrase that question. When did Litton make the initial decision to phase out cold type in favor of hot type?
A Some time — the discussions started the early part of the year.
Q Early part of 1980?
A Right.
Q And where were those discussions carried out, I mean, in what level of management?
A Well, they started in top management and then filtered down to the plant level.
Q When did you first become aware of any discussion to phase out the cold type?
A Well, there were discussions some time in the middle of June, preliminary.
Q In terms of phasing out the cold type, did this mean the

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Q Well, which of them worked on the cold type equipment?

JUDGE LITVACK: Do you know which ones we're talking about?

BY MR. ROSENFELD:

Q Well, let me show you General Counsel's Exhibit 8. I'll show you my copy which has the name Brosig written at the bottom since we stipulated that that was a layoff. Which of these people worked specifically on the cold type equipment?

A Okay. Well, Jean Ceccato, Mildred Baker, Teresa Marquez, Catherine Klier, Claire Lundegard, Eileen Moller, Helen Soto.

Q And what work did Helen Soto do?

A Helen Soto was an addressograph operator.

Q And she worked on — was the addressograph machine she worked on in September or October?

A It was not removed, no —

Q It wasn't removed, was it?

A No, it wasn't removed. But the work that that machine was doing is greatly reduced, and so the work isn't there to be done any more.

Q After Ms. Soto was laid off, the machine remained, did it not?

A The machine remained.

Q And there remained some work to be done on that machine, isn't that correct?

A Minimal, right.

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Q There is some work, yes or no?

MR. DIEDERICH: Your Honor, I want to object. She's asked and answered and you're not cross examining her. You called her as your witness.

JUDGE LITVACK: Not only that, I don't understand how this is relevant to the obligation to bargain. It seems to me you're dealing with — you're talking about individual jobs, and you're dealing with the validity of

the layoff. That's not an issue, and I'm not going to let you litigate it.

MR. ROSENFELD: Now —

JUDGE LITVACK: Is that clear, Mr. Rosenfeld?

MR. ROSENFELD: I understand your —

BY MR. ROSENFELD:

Q Half the people laid off worked on the hot — on the cold type equipment, and half did not, that's —

A No, I didn't say that.

Q Well, you gave me six names of people who worked on the cold type equipment.

A There were a few people that did other things besides, but mainly their duties were involved in cold type, but not totally.

(Pause.)

Q But this layoff reduced the number of people in the bargaining unit by about what per cent?

A I don't know. I never figured it out on a percentage

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A Yes.

Q Give us just a brief description of the nature of the company's business.

A The Company's business is, we are check printers. And we process checks for customers and banks on various colors of paper and various package quantities.

Q You're talking about personal and business checks that the average customer of a bank would use.

A That's correct.

Q And your Company prepares those checks for the banks?

A For the banks' customers.

Q Are your contractual relationships with the banks' customers or with the banks?

A With the banks.

Q Is there more than one plant?
A Yes, there are seven.
Q Where are they located?
A Fresno, California; Los Angeles, California; San Diego, California; the Santa Clara plant, California; Nacaville, which is back in Michigan; and Munson, which is back in Massachusetts.
Q And in all of these plants, do they prepare or produce checks?
A Yes.
Q Is there anything different about any of the six plants

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that you mentioned from the others?
A The difference between the Santa Clara plant and the remainder of the plants wat that Santa Clara had a dual operation. They processed checks by methods of both offset and hot type. None of the other plants do that.
Q When you say offset, is that the same as cold type?
A Cold type, yes.
Q Was there anything different about the operation in the Fresno plant?
A No.
Q What about base stock?
A There was a limitation with the cold type operation; with the cold type operation that we had, there was a limitation as to how many items we could print up on a sheet of paper.
Q Let me rephrase my question. Did all six of the plants prepare their own base stock?
A. No.
Q Where did the base stock for the plants come from?
A It comes from a central location which is located in Fresno.

Q That would have been the Fresno plant?
A The Fresno base stock plant; there's also an imprint plant there.
Q All right. Would you give us a description of the cold type operation —

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checked. Then it comes out into the plant again, and goes on to — the intertype are the — the vertical presses and these — the configurations on the forms are in a twelve-on format. There are twelve to a page.
Q So in a hot type operation, you get twelve to a page, and in cold type, the most you can get is five?
A Right.
Q Did there come a time in the Company when a decision was made to go from cold type operation totally to a hot type operation?
A Yes.
Q At that time, other than in Santa Clara, were there any other plants of Litton using the cold type operation?
A No.
Q Explain for us — did you participate in the decisionmaking process?
A. Yes.
Q Would you explain for us the reasons for the decision? What was the decision? To go to hot type?
A The decision was to go to hot type.
Q What were the reasons for the decision?
A One of the major decisions — one of the major reasons was that the banks had been expressing discontent with the quality of the work that we were able to produce for them on a cold type operation.

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when there's no dispute about the layoffs?

JUDGE LITVACK: Wait, Mr. Diederich. Mr. Diederich. You withdrew your question, then you restated another one. He didn't object to that one, to the second one.

MR. DIEDERICH: All right. Tell us whether or not, about this time, you had layoffs?

MR. ROSENFELD: Objection, Your Honor. That's leading. When he says, "about this time", it —

JUDGE LITVACK: All right. It's over. It's not a leading question. What time are you talking about, Mr. Diederich? What time period are you talking about? She hasn't told us when this —

MR. DIEDERICH: First — the end of August.

JUDGE LITVACK: Well, let me — about approximately when did the Company lose this Wells Fargo business?

THE WITNESS: Some time in July, the beginning — we knew about it — we had prior information on it starting out some time in around July.

JUDGE LITVACK: All right. And when was the final decision made to go to hot type printing?

THE WITNESS: It was made then after that, very soon after that.

JUDGE LITVACK: Okay.

THE WITNESS: The discussions had been going on previous to this, that it would be a good idea to do this, but

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if I have something to say, at least listen to it, you know.

MR. DIEDERICH: I'm listening.

JUDGE LITVACK: Yeah, but you seem to be talking while I'm trying to talk.

The whole point, Mr. Rosenfeld, is that it may be leading if no questions at all had been asked before, but the witness has spent ten minutes discussing how they implemented the decision, so I hardly think the question is leading at that point.

Now, Mr. Diederich.

BY MR. DIEDERICH:

Q As a result of going from out of the cold type business, so to speak, was there a need to lay people off?

A. Yes.

Q Will you explain that? Were the people who were laid off involved in cold type or hot type or what? That's what I'm driving at.

A The people that were — the majority of the people that were laid off — the people that were laid off were involved in cold type. As a primary job.

Q Did the decision to go from cold type to hot type, was that implemented, so to speak, overnight, or was there some phasing in, phasing out type of plan in effect?

A No, there had to be a phase out operation because before there could be a phase in.

Q Would you explain how that worked?

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A We received a letter with the grievances attached to it.

Q I'll show you what's been admitted as General Counsel's 4 and ask you if that's the letter you received with the grievances?

A Yes.

Q Now, Ms. Arnold, that letter, among other things, besides attaching the grievances, says, "The Union hereby requests that the Company meet with our representatives to discuss this layoff and its impact on these

senior people, and requests that pending resolution of this matter, that each and all of them be reinstated to their employment." Do you remember that letter.
A Um hmh.
Q You forwarded that letter to Mr. Diederich, didn't you?
A Yes.
Q You didn't answer it yourself?
A No.
Q Now, you're still paying health and welfare and pension contributions per the expired contract, aren't you?
A As far as I know.
Q Now, when you received — now, as I understand it, the steward initially presented the grievances to the Company, is not that correct?
A Not that I recall.
Q When did you first become aware of the grievances?

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end result of the discussions, the decision was made.
Q When — by this, I'm asking for the date.
A The specific date — I can't give you a specific date.
Q Was it in April, May or June?
A It was later than that because the results of what we'd previously talked about hadn't been all — the decision hadn't been reached at that time. The decision was made some time, I would say, the end of July or middle August.
Q Now, when was the work actually transferred to other plants?
A It started to go out before the layoffs took effect.
Q And when did you complete transferring the work to the other plants?

A It wasn't completed until some time after the layoffs took place.
Q How long?
A Two, three weeks.
Q And you never went to the Union and discussed — or you never notified the Union that work was being transferred out of the plant, did you?
A. No.
Q Now the people who were laid off were people who worked exclusively on cold type equipment or the associated equipment?
A Yes.
Q And these tended to be the — well, I assume the cold

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type was the initial type of equipment in the plant. Hot type came in later?
A Yes.
Q So the people who had capabilities only in cold type tended to be the older people, people with more seniority?
A In some cases.
Q Well, the fact is of the first eleven people on the seniority list, six of them were laid off, isn't that correct?
Q Um hmh.
JUDGE LITVACK: The witness is technically accurate when she said in some cases. All that you're showing is that she's right, in some cases.
BY MR. ROSENFELD:
Q The fact is that in the top eleven people of the seniority list, over half of them were laid off?
A In the beginning, that plant was strictly a cold type operation.

Q Well, ma'am, of the first eleven people on the seniority list —

MR. DIEDERICH: I want to object —

JUDGE LITVACK: She's answered your question, Mr. Rosenfeld.

BY MR. ROSENFELD:

Q Now, after the people were laid off, you paid them severance pay, didn't you?

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[SELECTED QUESTIONS AND ANSWERS FROM TRANSCRIPT OF HEARING]

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MS. MILOWICKI: Yes, Your Honor. General Counsel would lilke to mark for identification GC No. 7 a seniority list titled August 26, 1980, produced in response to the subpoena. General Counsel would like to offer a stipulation that this is a seniority list of the employees employed in the unit covered by

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the collective bargaining agreement, and that the document was produced in response to a subpoena, and lists the hire dates of the employees that are pled in the Complaint. And move it into evidence.

MR. DIEDERICH: I have no objection and I join in the stipulation.

JUDGE LITVACK: I take it that the unit that is pled in the Complaint is the maintenance and production unit, and these are the employees in that unit, is that what you're talking about?

MS. MILOWICKI: Yes, Your Honor.

JUDGE LITVACK: And Mr. Diederich, am I to understand that this is — this was — this document represents a compillation [*sic*] of Respondent's records and represents all the people in the unit?

MR. DIEDERICH: It's not a compilation of records; it is an actual record that the Company had at that time, which was a seniority list.

JUDGE LITVACK: Okay. But these are — this is the sum total of the employees in the bargaining unit?

MR. DIEDERICH: Yes.

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MR. ROSENFELD: I join in that, Your Honor.

JUDGE LITVACK: All right. General Counsel's Exhibit No. 7 is received.

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MS. MILOWICKI: General Counsel would like to mark for identification as General Counsel's No. 8 a document that is entitled "Following information is a seperation [*six*] report for listed personnel" that has on it the names of the employees that were pled in the Complaint and the amount of severance pay that they received.

The General Counsel would like to offer a stipulation that this document is authentic, that it was produced in response to a subpoena and move it into evidence.

JUDGE LITVACK: Mr. Diederich?

MR. DIEDERICH: So stipulated and no objection.

JUDGE LITVACK: And Mr. Rosenfeld?

MR. ROSENFELD: I join in that, Your Honor.

JUDGE LITVACK: All right. General Counsel's No. 8 is received.

(The document referred to was marked for identification as General Counsel's Exhibit No. 8, and was received in evidence.)

MS. MILOWICKI: At this time —

JUDGE LITVACK: Without looking at the — without

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comparing each and every individual, Ms. Milowicki, are all the names listed in the Complaint, Paragraph 11(a), on General Counsel's No. 8? Are they the same?

MS. MILOWICKI: Yes, Your Honor. Yes, Your Honor.

JUDGE LITVACK: Mr. Diederich, is that your understanding?

MR. DIEDERICH: No, that is not corret. There is one individual by the name of G. Brosig whose name is not on that document. The reason her name was not on that document is because at that time she was taking vacation, so her severance pay was paid later, and was actually $3,830.40.

JUDGE LITVACK: Do you have a separation date for her?

MR. DIEDERICH: And the separation date — no, we don't have a separation date for her. Actually, she would have been separated the same day, Your Honor, except that she was on vacation, so there was a period of two to three weeks when she was on vacation. So I think the same — the separation date for her would have been —

JUDGE LITVACK: You have two —

MR. DIEDERICH: 8/29.

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MR. DIEDERICH: Well, there's one employee who was laid off who apparently had no seniority at all, that's Raul Navarette.

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JUDGE LITVACK: Okay. That stipulation is received.

I noticed in your Answer to the Complaint, you denied the allegations set forth in Paragraph 11 based on what is represented on General Counsel's No. 8 and what you've stipulated to. Is that still your position as to the paragraph, or is there something about the paragraph which you feel is

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wrong?

MR. DIEDERICH: Well, there's something about the paragraph, it's — if you look at 11(a), Your Honor, it says that the Respondent permanently lost those employees, and what I was denying was that we permanently laid them off. We laid them off, but obviously we intended to subsequently recall them, so it couldn't have been a permanent layoff.

And, 11(b) I denied because it alleges that we laid those employees off in nonconformity with Section 12 of the expired collective bargaining agreement and we deny that. I think we complied with the terms of that agreement, even though it had expired a year earlier.

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MS. MILOWICKI: Oh, I'm sorry. No, Your Honor. There is one item that — there is a motion for — that Respondent is

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challenging the certification and there is a motion for some rejudgement on that issue pending before the Board, and that should that decision come down before you write your decision in this case, we would be happy to send that to you.

JUDGE LITVACK: I would be bound by you to send that to me. I take it — I was going to ask you about that, but you —

MR. DIEDERICH: Well, it raises a rather interesting question. I suppose you could decide that the Company had no obligation to bargain with the Union, but the Board might decide otherwise, or vice versa.

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JUDGE LITVACK: All right. Now, in going over the Complaint and the Answer, I did have some questions. One I think has been taken care of. I can't get — based on what you've told me, Ms. Milowicki, there obviously had been — well, let me ask. Had you filed objections to the conduct of the election, Mr. Diederich?

MR. DIEDERICH: Yes.

JUDGE LITVACK: Okay. And I take it that the Region had issued a report finding that they were not meritorious in certifying —

MR. DIEDERICH: I think the Region initially issued a report setting the matter for hearing. If I'm correct — and eventually there was a hearing, and there was a hearing officer's report which overruled the objections. And I believe a petition for review or exceptions — I forget which one — were not accepted, or were rejected by the Board. And then —

JUDGE LITVACK: By the Board, and —

MR. DIEDERICH: Then there was an 8(a)(5), a continued refusal to bargain, and an 8(a)(5) case filed. And an Answer filed. And then a Motion for Summary Judgment, which is still

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pending before the Board.

JUDGE LITVACK: Okay. So there is a Motion for Summary Judgment pending right now before the Board?

MR. DIEDERICH: Yes. Which will go toward the validity of the certification.

JUDGE LITVACK: That goes to your first affirmative defense, No. 1?

(Pause.)

MR. DIEDERICH: Yes, yes, that's what's involved in that allegation.

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MS. MILOWICKI: Yes, sir. The — it is a position of the General Counsel that the certification that issued in July of 1980 that's part of the formal documents is a valid certification. The motion that's up for Summary Judgment is just a typical technical 8(5), just testing that certification.

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JUDGE LITVACK: On the record.

Just so I understand what your legal position is on the obligation to at least process the grievances, is it your position that you have no legal obligations — assuming now that — putting aside your contention that the Union is not

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the majority representative of the employees, assuming that it is —

MR. DIEDERICH: Yes.

JUDGE LITVACK: Is it your position that Respondent has no legal obligation even to meet and process the grievances through the steps of the grievance procedure, not including arbitration?

MR. DIEDERICH: Uh —

JUDGE LITVACK: Or does it go solely to the issue of whether or not you had the majority?

MR. DIEDERICH: It's my position that Section 8(a)(5) of the Act does not require the Company to process grievances through the formal grievance procedure

and certainly not to participate in arbitration. I acknowledge again, assuming that the Union did represent the employees and had majority status. That certification was valid. The Company would have an obligation to bargain collectively about grievances. But not to follow a grievance procedure, a step by step grievance procedure which was outlined in a contract which had expired approximately a year earlier.

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MR. DIEDERICH: I assume that there are cases where contracts have expired and the parties have been bargaining, maybe a strike's in effect, and the Company has taken unilateral action. I don't know if *American Sink Top* is that type of case, but I think we have here a case which may be a little different. Because here you have a case where you're testing the certification, and a passage of a year, and I think those are relevant and significant factors that would be considered by the Board.

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MS. MILOWICKI: I'm sorry to interrupt you. To the extent that the contractual layoff clause — although we mentioned severance elsewhere, I should back up on that a little bit. Our basic contention in Paragraph 11(b) is that the

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employees were laid off out of seniority. To the extent that the layoffs were permanent and could be construed as terminations, we are also contending that the employees — that the Union should have been notified about

those layoffs prior to the layoffs in conformity with the contractual layoff clause which will speak for itself.

JUDGE LITVACK: Okay. Mr. Diederich, is it your position vis a vis Paragraph 11(b) that other considerations, other than seniority, went into the layoffs of some of these people?

MR. DIEDERICH: Yes.

JUDGE LITVACK: All right. Ms. Milowicki, do you have evidence — are you going to present any affirmative evidence that — because I've noticed, in reading Paragraph 12(a), it says, "It is understood that —

MR. DIEDERICH: 12(a)?

JUDGE LITVACK: Yes. Paragraph 12(a) — no, of the contract, I'm sorry.

MR. DIEDERICH: Oh, I'm sorry.

JUDGE LITVACK: It says, "It is also understood that in case of layoffs, length of continuous service will be the determining factor if other things such as aptitude and ability are equal." Is it your position that all the employees listed on this seniority list were equal as to aptitude and ability and therefore your people alleged in the Complaint were laid off solely because — or should not have been laid off because of

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their seniority?

MS. MILOWICKI: It is our contention that the people that we have alleged in the Complaint were laid off out of seniority, the General Counsel does not plan to put on any affirmative evidence as to aptitude and ability, and contends that that would in essence be litigating the underlying grievance.

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Q Now, you're still paying health and welfare and pension contributions per the expired contract, aren't you?

A As far as I know.

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MR. DIEDERICH: Our position is that we were willing to discuss the grievances with the Union, but we were not willing to go through a formal grievance and arbitration procedure which is what they were demanding.

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NATIONAL LABOR RELATIONS BOARD
Case No. 32-CA-3160

[SELECTED PAGES OF DECISION]

JD-(SF)-242-81
Santa Clara, CA

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

LITTON FINANCIAL PRINTING DIVISION,
A DIVISION OF LITTON BUSINESS
SYSTEMS, INC.
and
PRINTING SPECIALTIES AND PAPER
PRODUCTS UNION, DISTRICT COUNCIL
NO. 1, INTERNATIONAL PRINTING AND
GRAPHIC COMMUNIATIONS UNION

Case No. 32-CA-3160

Patricia Milowicki, Atty., of Oakland, CA, for the General Counsel.
David Rosenfeld, Esq., Van Bourg, Allen, Weinberg & Roger, of San Francisco, CA, for the Charging Party.
M. J. Diederich, Esq., Corporate Director of Industrial Relations, of Beverly Hills, CA, appearing for Respondent.

DECISION

BURTON LITVACK, Administrative Law Judge

Statement of the Case

This matter was heard before me in Oakland, California on March 19, 1981. On November 24, 1980[1] the Regional Director for Region 32 of the National Labor Relations Board, herein called the Board, issued a complaint, based upon an unfair labor practice charge filed on October 27 by Printing Specialties and Paper Products Union, District Council No. 1, International Printing and Graphic Communications Union, herein called the Union, alleging that Litton Financial Printing Division, a Division of Litton Business Systems, Inc., herein called Respondent, engaged in acts and conduct violative of Section 8(a)(1) and (5) of the National Labor Relations Act, herein called the Act. Respondent filed an answer, denying the commission of any unfair labor practices. All parties were afforded the opportunity to offer relevant evidence, to examine and cross-examine witnesses, and to submit post-hearing briefs. All parties filed such briefs, and these have been carefully considered. Based upon the entire record, the post-hearing briefs, and upon my observation of the demeanor of the witnesses, I make the following:

[1] Unless otherwise stated, all events herein involved occured in 1980.

Findings of Fact
[Left margin line numbers omitted in printing]

I. Jurisdiction

Respondent, a State of New York corporation, with an office and place of business in Santa Clara, California, is engaged in the wholesale printing and distribution of financial documents. During the 12-month period immediately preceding issuance of the complaint, Respondent, in the normal course and conduct of its business operations, purchased and received goods or services valued in excess of $50,000 directly from suppliers located outside the State of California and sold and shipped goods and products valued in excess of $50,000 directly to customers located outside the State of California. The answer admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

The answer admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. Issues

1. Did Respondent violate Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union concerning its decision to lay off 10 employees?

2. Did Respondent violate Section 8(a)(1) and (5) of the Act by refusing to abide by the terms of its expired collective-bargaining agreement with the Union by refusing to process grievances through, and including, arbitration concerning the laid-off employees?

3. Did Respondent violate Section 8(a)(1) and (5) of the Act by, without prior notice to or bargaining with the Union, by-passing the Union and paying to the aforementioned 10 laid-off employees severance pay benefits.

A. Facts

Respondent is a State of New York corporation and is engaged in the business of printing bank checks for utilization by customers of commercial banks. While the checks are printed in accordance with customer orders, Respondent's contractual relationship remains with its client banks. In performing its service, Respondent has plants located in Nacaville, Michigan; Munson, Massachusetts; and Fresno, Los Angeles, San Diego, and Santa Clara, California. At all times material herein, Mary Arnold was the plant manager at Respondent's Santa Clara, California facility, the only one of the aforementioned plants involved herein.

With regard to the Santa Clara facility, the record discloses that for several years, the Union has been the collective bargaining-representative of the production and maintenance employees employed therein and that, at least since 1974, Respondent and the Union have been signatory to collective-bargaining agreements covering said individuals. The most recent contract expired on October 5, 1979. Pursuant to the filing of a decertification petition, on August 17, 1979, the Regional Director of Region 32 conducted a secret ballot election in a unit consisting of the production and maintenance employees employed at the plant; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act. A majority of the voting unit employees cast ballots in favor of the Union, and on July 2, 1980, the Union was certified as the exclusive representative for purposes of collective bargaining of the

employees in the aforementioned unit. Notwithstanding said certification, commencing on August 1, Respondent refused to bargain with the Union. Thereafter, a charge was filed in Case 32-CA-3036, and on June 12, 1981, the Board concluded[2] that by its aforementioned conduct, Respondent had acted in violation of Section 8(a)(1) and (5) of the Act.

The record further discloses that the events, giving rise to the allegations herein, had their genesis prior to the Board's certification of the Union. Mary Arnold testified that early in 1980 Respondent's upper management officials commenced studying and discussing the feasibility of converting the check-printing process at the Santa Clara, California plant from utilization of both the hot type[3] and cold type[4] printing methods to solely

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2 256 NLRB No. 77.

3 In the hot-type printing process, orders are either sent directly to the Santa Clara plant by the customer bank or the latter sends a magnetic tape, containing all check information, to Respondent's main computer center in Los Angeles, from which location the check information is disseminated to all plants which are participating in the bank's order. In either case, the order is fed into an "intertype" machine in which lead "personalization" of the ordered check is produced. The lead is then proofread and placed in vertical printing presses, and checks are imprinted on a "twelve-on" format (12 checks to a sheet).

4 In the cold-type printing process, check orders would be received at the Santa Clara plant and sorted down by color and size (business checks would be printed in a "three-on" format while personal checks were printed in a "five-on" format). Next, the order would be given to an individual who operated an addressograph machine. This machine contains a diecrul plate upon which the bank's branch information has previously been imprinted, and said information is, during this process, printed on the "paper master" of the check order. Next, a typist transcribes the check order information onto the paper master. After proofreading, the order plate is placed in an offset

(continued)

a hot-type printing procedure. At that time, that plant was the only one of Respondent's facilities in which both printing methods were employed and, in fact, the only plant utilizing the cold-type process. According to Arnold, four factors influenced Respondent's contemplated elimination of this latter method: a loss of orders due to customer bank discontent with the quality of print produced by the cold-type printing method; the "twelve-on" format produced by the hot-type procedure was more economical; in the event of an emergency, other plants would thereafter be able to "pick up" Santa Clara's work; and, finally, training, research and development, and equipment costs would be significantly reduced by use of a single printing process.

Despite the foregoing considerations, as of July Respondent had not yet finally decided to implement the purposed conversion of the Santa Clara facility to wholly a hot-type printing operation.[5] However, in that month, a major customer, Wells Fargo Bank, cancelled approximately 30 percent of its cold-type print orders, and, according to Arnold, the final decision to cease utilizing cold-type printing ". . . was made . . . very soon after that." Arnold further testified that implementation of Respondent's conversion plans was not intended to be an overnight process but rather a gradual one: ". . . there had to be a phase out operation . . . before there could be a phase in." Thus, Respondent required time to remove the existing cold-type printing equipment from the plant and to install additional hot-type equipment. In order to

(ftn. continued)
printing press in which process the order is photoengraved onto check stock.

5 At one time, cold-type print orders constituted 60 percent of the Santa Clara plant's business. By July, this percentage had decreased to approximately 30 percent of the work at that location.

facilitate this procedure, ". . . some work that we were doing on cold type . . . was transferred to one of the other plants . . .," with the intent that after sufficient hot-type equipment was operational, ". . . we could then go back and pick that work up . . ." on a hot-type basis. Arnold stated that the decision to divert the remaining cold-type print orders to this other plant was reached in mid-August and that the complete transferral of such work was not completed until mid-September.[6] With regard to the remaining cold-type printing equipment, the record reveals that as of the hearing date, of Respondent's 16 or 17 offset printing presses, six or seven typewriters utilized only for this work, two addressograph machines, and some miscellaneous equipment, Respondent continued performing minimal work on the addressograph machines, had removed from the plant and warehoused the offset printing presses and excess typewriters, had sold two printing presses, and was actively seeking buyers for the remaining material. Also, Respondent was in the process of purchasing new hot-type equipment and transferring to Santa Clara such machinery from other plants. As of the hearing date, Respondent's capital expenditures, involved in the conversion process, were approximately $20,000.

The record further reveals that in the midst of transferring cold-type printing work to the other plant and out of an existing employee complement of 42 individuals, on August 29 and September 2, Respondent laid off 10 employees: Mildred Baker, Teresa Marquez, Catherine Klier, Claire Lundegard, Gloria Hernandez, Eileen Moeller, Carmen Mata, Jean Ceccato, Helen Soto, and

6 As previously noted, Arnold testified that Respondent's Santa Clara facility was the sole facility which maintained a cold-type printing capability. She did not explain this contradiction.

Geida Brosig. Arnold testified, "We decided to lay people off because we lost a volume of business and . . . we then made the decision to go to hot type." Elaborating further upon the relationship between the decision to lay off employees and the implementation of the conversion plan, she testified, "The work that we lost from Wells Fargo Bank and the comments that we'd been having from some other banks about our [cold type] quality were specifically involved . . . ."[7] Specifically as to why the above individuals were selected for the layoff, Arnold next stated, ". . . the people that were laid off were involved in cold type. As a primary job." Closely examined on this point by counsel for the Union, Arnold stated that employees Ceccato, Baker, Marquez, Klier, Lundegard, Moeller, and Soto worked solely on cold-type equipment and that the remaining laid-off individuals ". . . did other things besides but mainly their duties were involved in cold type, but not totally."[8] Arnold compared these employees to those who were retained, averring, without contradiction, that the latter employees all possessed dual capabilities in both printing processes.[9]

The record establishes that each of the laid-off employees was a member of the bargaining unit for which the Union had been certified as the representative for

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7 Under cross-examination, Arnold admitted that the transfer of work out of the Santa Clara plant was a partial reason for some of the layoffs.

8 Arnold admitted that employee Brosig worked on neither hot- or cold-type equipment but rather was classified as an "operator" and worked on a machine called a "guillotine cutter."

9 Arnold, in response to a question posed by counsel for the Union, agreed that rather than laying off the 10 employees, Respondent might have undertaken to retrain them to perform hot-type printing work.

purposes of collective bargaining and that notwithstanding this fact and the absence of any such provision in the expired collective-bargaining agreement between the parties and of any past practice to give such compensation, Respondent gave severance pay, in amounts ranging from $711.60 to $2,599.80, to each laid-off individual without first notifying and giving the Union an opportunity to bargain.[10] As to the procedure for layoff, Section 12(A) of the aforementioned expired contract sets forth the parties' practice in this regard:

> Whenever an Employer intends to lay off all or part of his employees, he shall give notice of such intention not later than quitting time of the previous working day. It is also understood that in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal.

Marilyn Major, a Union business agent who has been responsible for the bargaining-unit employees since April or May 1979, testified without contradiction, that no Union representative was notified prior to the August 29 and September 2 layoffs that such would occur. Finally, a review of General Counsel's Exhibit No. 7, which is a seniority list for all employees as of August 26, 1980, establishes that the above-described layoffs

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10 Arnold testified, "Top management decided that that was a company policy and that was right to do that." There is no other record evidence regarding a past practice to grant severance pay, and Arnold did not elaborate on her vague testimony on this point. Accordingly, I do not conclude that Respondent had any sort of past practice in this regard.

were not consummated in strict accordance with seniority.

Business agent Major testified that she first became aware of the layoffs when informed by the affected employees themselves. Thereupon, she instructed the shop steward, Linda Stockdale, to file grievances, pursuant to the grievance and arbitration procedure set forth in Section 21 of the expired collective-bargaining agreement.[11] Although Arnold could not recall the filing of any grievances, Major testified that such were filed, and General Counsel's Exhibit 4 has 10 attachments, all dated September 5, which are grievance forms for each laid-off employee, protesting the propriety of each respective layoff. Major further testified that Respondent refused to accept any of the grievances, and I specifically credit her more logical testimony in this regard. In any event, on September 24, as a ". . . follow up to document the fact that the grievances had been filed," Major sent a letter to Arnold, stating that the aforementioned grievances had been filed and requesting ". . . that [Respondent] meet . . . to discuss this layoff and its impact on these senior people . . . ." Respondent admits that it failed and refused, and continues to fail and refuse, to process the employee grievances pursuant to the grievance and arbitration procedure, set forth in the expired collective-bargaining agreement. On November 3, Respondent's attorney wrote to Major agreeing to a meeting ". . . to discuss the effects of the layoffs . . . ." On November 10, the Union's attorney responded, renewing the Union's demand that Respondent bargain

11 The expired contract established a two-step grievance procedure for matters concerning ". . . the interpretation or application of the terms of the Agreement . . . . "If such remained unresolved, the grievance could "be jointly submitted" to arbitration, with the parties sharing the costs of such on an equal basis.

with regard to *both* the decision to lay off any employees and the effects thereof. It is uncontroverted that since receipt of the latter letter, Respondent, while willing to bargain over the effects, has refused, and continues to refuse, to bargain over its decision to lay off the 10 affected employees.[12] Also, the Union has never requested to meet with Respondent to discuss the effets of the layoffs.

During cross-examination by counsel for Respondent, business agent Major was extensively questioned with regard to the meaning of Section 12(A) of the expired contract. Testifying that, upon assuming her position in 1979, she had no conversations with her superiors as to the meaning of the entire contract, in general, and the layoff procedure in particular, Major was asked whether Respondent had "the right to lay off employees without first bargaining about the decision to do so provided that it complied with the provisions of Section 12(A). She replied, "I think that that probably approximates my understanding that the Company does have the right to lay off employees under the provisions in the contract." She further admitted that seniority rights — and not prior bargaining — were the "primary concern" when she resubmitted the layoff grievances on September 24.

12 Arnold, who was the Santa Clara plant manager for approximately three and a half years, testified that during this period, there were two or three employee layoffs. While recalling that no more than five employees were involved on each occasion, Arnold could recall nothing more specific about each layoff, including the dates thereof, and Respondent offered no supporting documents. Further, while recalling that on each occasion the Union neither demanded that Respondent bargain or protested the fact of the layoff, Arnold offered no evidence that Respondent notified the Union prior to the layoffs or that the Union ever became aware of same.

Finally, she stated that the only qualifications to Respondent's right to lay off employees were ". . . the stipulations that exist in the contract as to how layoffs were to take place."

* * * *

2. Whether Respondent is Obligated to Process the Layoff Grievances Pursuant to the Contractual Grievance and Arbitration Procedure

Paragraphs 13(a) and 14(a) of the complaint together allege that Respondent acted in violation of Section 8(a)(1) and (5) of the Act by failing and refusing to process, pursuant to the terms of the expired collective-bargaining agreement, layoff grievances which were filed by the Union. Counsel for the General Counsel and counsel for the Union argue that the Board's decision in *American Sink Top & Cabinet Co., Inc.*, 242 NLRB 408, establishes that the grievance and arbitration provisions thereof survive the expiration of a collective-bargaining agreement and that, therefore, Respondent was obligated to process, through arbitration if necessary, the above-described layoff grievances. Respondent, while not disputing the meaning of *American Sink Top*, argues that the Board's decision was an unwarranted extension of the decision of the Supreme Court in *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243 (1977), and that the instant case is factually distinguishable from *American Sink Top*.[13]

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13 At the hearing, counsel for Respondent asserted that subsequent to the expiration of a contract which contains a formalized grievance procedure, an employer need not process grievances pursuant to said

(continued)

It is uncontroverted that Section 21 of the parties' expired collective-bargaining agreement sets forth a grievance and arbitration procedure for the resolution of disputes involving the interpretation or application of said contract; that the Union filed grievances on behalf of each of the laid-off employees; and that Respondent refused to process these pursuant to the aforementioned contractual provisions. The Board has long held that the grievance procedure of a collective-bargaining agreement survives the expiration thereof and is a term and condition of employment. *Martinsburg Concrete Products Co.*, 248 NLRB 1352; *Newspaper Printing Corporation*, 221 NLRB 811. Further, any unilateral changes with regard to the processing of disputes would be violative of Section 8(a)(1) and (5) of the Act. As stated by the Board, "It seems clear to us that an employer may not unilaterally attempt to impose new channels for resolution of disputes without undercutting the Union's representative status." *The Hilton-Davis Company, Division of Sterling Drug, Inc.*, 185 NLRB 241, 243. Accordingly, Respondent's failure to accept and process the layoff grievances pursuant to the expired contractual grievance procedure constitutes a unilateral change within the meaning of Section 8(a)(1) and (5) of the Act. *Martinsburg Concrete Products, supra*, at n. 3.

Likewise, I believe that if said grievances remain unresolved prior to that stage, Respondent may not lawfully, upon request, refuse to submit them to arbitration.

(ftn. continued)
procedure. Rather, the employer merely has an obligation to bargain collectively about the grievances. It is with this as background that Respondent points out that the Union has never acted upon its attorney's invitation to arrange a meeting to engage in bargaining over the effects of the layoffs.

In this regard, I note that the Board had traditionally held that arbitration provisions, unlike a grievance procedure, do not survive the expiration of a collective-bargaining agreement, reasoning that arbitration represented an employer's "consensual surrender" of economic power during the lifetime of an agreement — which power each contracting party is free to utilize after expiration of the contract, absent mutual consent. *Hilton-Davis, supra* at 242. However, outside the ambit of the Act and within the context of a civil suit to compel arbitration, the Supreme Court considered this identical issue. In *Nolde Brothers, supra,* a contractual dispute arose after the parties' contract had expired. The Court concluded that "... nothing in the arbitration clause expressly excludes from its operation a dispute which arises under the contract, but which is based upon events that occur after its termination," and that there existed no evidence that the parties had intended a contrary result. *Nolde Brothers, supra* at 249, 253. Accordingly, the employer was ordered to arbitrate the dispute. In *American Sink Top, supra,*[14] the Board adopted the rationale of the Supreme Court, delineating and defining an employer's obligation to arbitrate, after the expiration of a contract, within the meaning of the Act. Therein, a contract expired, and approximately three months later, the employer refused to process an employee grievance based upon the expired agreement. As herein involved, said contract provided for arbitration of unresolved grievances. The Board reasoned, "The grievance's basis is 'arguably' — at least — the contract, and there is no

[14] Contrary to counsel for the Union, rather than expressly overruling *Hilton-Davis,* the Board merely adopted the *Nolde Brothers* rationale but without disavowing its prior reasoning. However, such does not detract from my finding that *Hilton-Davis* no longer represents the rationale of the Board on this point.

reason to conclude that the parties had intended the arbitration provisions to end with the contract's term." *American Sink Top, supra.* Accordingly, the Board required that the employer therein not only process the grievance but also arbitrate the matter, if necessary.[15]

Respondent argues that the wording of the expired collective-bargaining agreement herein establishes that the parties did intend the grievance and arbitration provision to end with the contract's term. Counsel points to the following language on the first page of that agreement, "WITNESSETH: That the above parties do mutually agree that the stipulations set forth shall be in effect for the time hereinafter specified," and asserts that such must be accorded recognition as the intent of both Respondent and the Union. I do not agree. Initially, there is no language within the grievance and arbitration provision (Section 21) of the expired contract which limits the effectiveness thereof to the explicit term of the contract. Next, it is gainsaid that upon the effective date of the agreement, the provisions thereof, with certain exceptions, became the covered employees' terms and conditions of employment. As such, these survived the expiration of the agreement, and Respondent could not unilaterally lawfully modify or eliminate said terms and conditions without first notifying and giving the Union an opportunity to bargain. *N.L.R.B. v. Benne Katz, etc. d/b/a Williamsburg Steel Products Co.,* 369 U.S. 736 (1962). Carrying Respondent's utilization of the above-quoted language to its logical extreme would permit Respondent to modify or eliminate *any* term or condition

[15] Whether *American Sink Top* is an unwarranted interpretation of *Nolde Brothers* is an issue upon which I do not pass. Thus, I believe the former represents the Board's view of the latter's viability, and I am bound by that.

of employment which is incorporated in the expired agreement — a position wholly inconsistent with Section 8(a)(1) and (5) of the Act and one which I do not believe Respondent seriously advocates. Bearing the foregoing in mind, thre is no record evidence as to exactly what the parties intended by the quoted language, much less that such specifically included the grievance and arbitration procedure. Rather, as the Supreme Court in *Nolde Brothers* emphasized, the mere existence of an arbitration provision demonstrates that ". . . the parties clearly expressed their preference for an arbital . . . interpretation of their [contractual obligations] . . . the alternative remedy of a lawsuit is the very remedy the arbitration clause was designed to avoid." *Nolde Brothers, supra* at 253-254. Accordingly, based upon the record as a whole, I do not believe that the parties intended that the arbitration provision would end when the contract expired, and I find that by refusing to arbitrate unresolved grievances, Respondent acted, and continues to act in violation of Section 8(a)(1) and (5) of the Act. *American Sink Top, supra.*

NATIONAL LABOR RELATIONS BOARD
Case No. 32-CA-3160

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

[Logo omitted in printing] August 6, 1990

Re: Litton Financial Printing Division, A Division of Litton Business Systems, Inc. 32-CA-3160

M. J. Diederich, Esq., Corporate Director
of Industrial Relations
Litton Industries
360 North Crescent Drive
Beverly Hills, CA 90210

David Rosenfeld, Esq.
Van Bourg, Allen, Weinberg & Roger
875 Battery Street
3rd Floor
San Francisco, CA 94111

James S. Scott, Regional Director
National Labor Relations Board
PO Box 12983
Oakland, CA 94604

Dear Counsels:

This is to advise you that the Board has decided to accept the remand from the Court of Appeals in the above proceeding and that all parties, should they so wish, may file statements of position with respect to the issues raised by the remand. Such statements of position must conform to Section 102.46(j) of the Board Rules and Regulations must be received by the Board in Washington, D.C. on or before August 20, 1990. Thereafter, of course, the Board will take whatever action is consistent with the Court's remand.

Sincerely,
/s/ Enid W. Weber
Enid W. Weber
Associate Executive Secretary

(5)

No. 90-285

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

When the facts upon which a seniority-related grievance is based occur almost one year after the expiration of the collective bargaining agreement recognizing seniority and requiring arbitration, does Section 8(a)(5) of the National Labor Relations Act require the employer to submit to the arbitration of the grievance?

LIST OF PARTIES IN THE COURT BELOW*

The name of the only party to the proceeding in the Court of Appeals for the Ninth Circuit which is not listed in the caption of the case in this Court is:

Printing Specialties District Counsel
No. 2, as successor to Printing Specialties
District Council No. 1.

* Litton Industries, Inc. is the parent corporation of petitioner.

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No. 90-285

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

LITTON FINANCIAL PRINTING DIVISION,
A DIVISION OF LITTON BUSINESS
SYSTEMS, INC.,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF FOR PETITIONER

OPINIONS BELOW

The decision and order of the National Labor Relations Board (Pet. App. B1-B28) are reported at 286 NLRB 817. The opinion of the Court of Appeals (Pet. App. A1-A22) is reported at 893 F.2d 1128.

JURISDICTION

The judgment of the Court of Appeals was entered on January 16, 1990. An order of the Court of Appeals denying a petition for rehearing was filed on May 31, 1990. Pet. App. D1-D2. The petition for a writ of certiorari was filed on August 14, 1990. Pursuant to Rule 13, Rules of the Supreme Court of the United

States, a petition for a writ of certiorari to review a judgment entered by a United States Court of Appeals may be filed with the Clerk of this Court within 90 days from the date of a denial of a petition for rehearing.

The petition for a writ of certiorari was granted by this Court on November 13, 1990, limited to the question set forth on page i of this brief.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. §158(a), provides:

> (a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer —
>
> . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

2. Section 8(d) of the National Labor Relations Act, 29 U.S.C. §158(d), provides:

> (d) Obligation to bargain collectively. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and

> other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the

existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

3. Section 13 of the National Labor Relations Act, 29 U.S.C. §163, provides:

Nothing in this Act . . . except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

4. Section 201 of the National Labor Relations Act, 29 U.S.C. §171, provides:

It is the policy of the United States that —

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and

employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreement provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding

> the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

5. Section 203(d) of the National Labor Relations Act, 29 U.S.C. §173(d), provides:

> (d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The [Federal Mediation and Conciliation] Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

6. Section 301(a) of the National Labor Relations Act, 29 U.S.C. §185(a), provides:

> (a) Venue, amount and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

1. Background

Petitioner operated a printing plant in Santa Clara, California. Its production employees were represented by the Printing Specialties & Paper Products Union No. 777, Affiliated With District Council No. 1 (the Union). The last contract between petitioner and the union expired *October 5, 1979.* Pet. App. A4, B3.[1] Two printing processes were used: cold-type and hot-type. For economic reasons, petitioner converted solely to hot-type printing, and in late August and early September 1980 laid off ten employees who worked exclusively or primarily in the discontinued cold-type operation. The layoffs were not in order of seniority. The union filed grievances alleging the layoffs were "out of seniority." The expired collective bargaining agreement (CBA) provided that "in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal." J.A. 30, Tr. 9, 10. The expired CBA contained articles dealing respectively with grievances and arbitration. J.A. 34-36. Petitioner declined to implement the grievance and arbitration provisions of the expired CBA, instead offering to negotiate with the union over the "effects" of the layoffs. Pet. App. A6, B4-B5.

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[1] The Board and Court below found the contract expired October 5, 1979. It is more likely it expired October 4, 1979. J.A. 53, Tr. 9-10. However, the date of October 5 is used throughout this brief.

2. National Labor Relations Board Proceedings

A Regional Director for the National Labor Relations Board (Board) issued a complaint against petitioner on November 24, 1980, alleging petitioner had engaged in an unfair labor practice "within the meaning of Section 8(a)(1) and (5) . . . of the Act" by refusing to adhere to the grievance and arbitration provisions of the expired CBA. J.A. 15, Tr. 7-8. On September 4, 1981, after a hearing, an Administrative Law Judge (ALJ) issued his decision, finding petitioner had violated Sections 8(a)(1) and (5) of the Act. J.A. 105. The ALJ relied upon the Board's decision in *American Sink Top & Cabinet Co., Inc.*, 242 NLRB 408, (1979) and this Court's decisions in *N.L.R.B. v. Benne Katz, etc.*, 369 U.S. 736, and *Nolde Brothers, Inc. v. Local No. 358, etc.*, 430 U.S. 243, distaining the Board's ruling in *The Hilton-Davis Company, etc.*, 185 NLRB 241 (1970). J.A. 117-120.

On May 29, 1987, while the instant case was pending, the Board issued its decision in *Indiana & Michigan Electric Co.*, reaffirming its conclusion in *Hilton-Davis Company* that "the arbitration commitment arises solely from mutual consent and that Congress did not intend the [Act] to operate to create a statutory duty to arbitrate." 284 NLRB 53 at 57 (1987). In *Indiana & Michigan*, the Board took a *Nolde Brothers* approach and applied that case to Section 8(a)(5) of the Act. *Nolde Brothers* was a civil action arising under Section 301(a) of the Act. 29 U.S.C. §185(a). As an exercise of its remedial power, the Board, in *Indiana & Michigan*, stated it would order the arbitration of a post-contract expiration grievance only where the grievance "arise[s] under" the expired agreement. 284 NLRB at 60-61.

In the instant case, the Board, relying on its recent decision in *Indiana & Michigan*, issued its decision on November 6, 1987, finding petitioner had violated Section 8(a)(5) of the Act by engaging in a blanket repudiation of the arbitration provision of the expired CBA. Pet. App. B7-B9. The Board declined to order arbitration, concluding the seniority grievances did not "arise under" the expired CBA because "[t]he right to lay off by seniority if other factors such as ability and experience are equal is not 'a right worked for or accumulated over time.' " Pet. App. B16.

3. Court of Appeals Opinion

On January 16, 1990, the Court of Appeals for the Ninth Circuit issued its opinion, "assum[ing] without deciding that the Board's *Indiana & Michigan* decision is a reasonably defensible construction of the Section 8(a)(5) duty to bargain," but reversing the Board's decision on the arbitration issue, finding "the Board erred in concluding that the layoff grievances in this case were not arbitrable, on the ground that they did not 'arise under' the expired CBA . . . ." Pet. App. A18-A22. The Court below specifically declined "the parties' invitation to resolve their dispute over *Indiana & Michigan*" (Pet. App. A18), rejecting petitioner's "contention that it had no obligation to arbitrate any post-expiration grievances because of the passage of time between the expiration of the CBA and the filing of the layoff grievances" as well as the Union's contention that "[r]ather than relying on Section 301 precedent such as *Nolde*, . . . the Board should be analyzing such charges under the 'unilateral change doctrine' of *NLRB v. Katz* . . . ." Pet. App. A18, A26, n. 8, A17.

This Court granted the petition for certiorari on the arbitration issue on November 13, 1990.

SUMMARY OF THE ARGUMENT

I.

The Board and Court below concluded petitioner had violated Section 8(a)(5) of the Act by refusing to arbitrate post-contract expiration grievances. Section 8(a)(5) imposes an obligation on an employer "to bargain collectively with the representatives" of its employees. Section 8(d) defines the obligation to bargain collectively. Part One of Section 8(d) is the "meet and confer" portion of the section. Part Two is the "notice giving" portion of Section 8(d). Petitioner was never charged with refusing to "meet and confer" nor with failing to give the Section 8(d) "notices." Neither the Board nor the Court below found petitioner had failed to "meet and confer" or give Section 8(d) "notices." Instead, the Board the Court below added a Part Three to the Congressional definition of collective bargaining and legislated that collective bargaining also requires an employer to arbitrate post-contract expiration grievances. This they did by applying to the instant case the holding of *Nolde Brothers, Inc. v. Local No. 358, etc.*, 430 U.S. 243. However, *Nolde Brothers, Inc.* was a civil action for breach of contract specifically authorized by Congress when it adopted Section 301(a) of the Act and is inappropriately applied in the instant case, an unfair labor practice proceeding. While it may be appropriate to bring a civil action for breach of contract against a party to a collective bargaining agreement who refuses to arbitrate, Congress clearly did not provide that such a refusal was an unfair labor practice.

II.

In any event, *Nolde Brothers, Inc.* should be modified, as suggested later in this brief, or, at least, narrowly confined to the facts in that case. *Nolde Brothers, Inc.* is inconsistent with various statutory pronouncements of Congress. It is contrary to the long-standing legal principle that arbitration is based upon mutual consent. It is out of sync with the realities of the collective bargaining process. It is difficult to apply, spawning disputes and litigation. It just does not work, depriving both unions and employers of the legal certainty necessary to conduct labor-management relations. Its foundation is suspect.

If *Nolde Brothers, Inc.* is to survive in its present form, it should be narrowly confined to its own facts, that is, to a dispute involving clearly vested or accrued rights which arises within a reasonably short period of time after contract expiration. So confined, *Nolde Brothers, Inc.* does not apply to the instant case.

III.

At first blush, seniority status may appear to be a vested right. But it is not akin to a wage, pension benefit or other form of compensation for labor. Seniority status exists only as a creature of contract. Even if seniority status is considered to be vested or accrued, the *role* which seniority status plays in such things as promotions, transfers and layoffs is not vested or accrued.

Further, in the instant case, seniority status, standing alone, did not determine the order of layoffs. Seniority status played a role in layoffs only when "other things

such as aptitude and ability are equal." Aptitude and ability and "other things" are not vested or accrued rights. Indeed, in some jobs, they may decrease with length of service. So if *Nolde Brothers, Inc.* does apply, the dispute over the order of layoffs in the instant case did not "arise under" the expired CBA.

IV.

The *Nolde* presumption of arbitrability is adequately negated by specific language in the expired collective bargaining agreement.

ARGUMENT

The Obligation of an Employer to Bargain, Imposed by Section 8(a)(5) of the Act, and Specifically Defined by Congress in Section 8(d) of the Act, Does Not Require the Arbitration of Post-Contract Termination Disputes.

The Board's complaint alleged that petitioner "has been engaging in unfair labor practices . . . within the meaning of Sections 8(a)(1) and (5) . . . of the Act . . . ." since October 5, 1980 by refusing to process grievances over layoffs which occurred on or after August 29, 1980. J.A. 15. It is undisputed that the collective bargaining agreement in which petitioner and the union agreed to arbitrate expired on October 5, 1979, some eleven months before the layoffs. Pet. App. A4, B3. There is no complaint allegation or Board or court finding that petitioner refused to meet with the union at a reasonable time and confer in good faith with respect to wages,

hours or conditions of employment, or the negotiation of an agreement or any question arising under an agreement. There is no allegation or finding petitioner refused to execute an agreement once reached. There is no complaint allegation or Board or court finding that petitioner failed to serve a written notice on the union proposing contract termination, or that it did not notify the appropriate Federal and State mediation and conciliation services of the existence of a dispute. There is no allegation or finding that petitioner failed to continue the collective bargaining agreement in effect until the later of contract expiration or the end of the notice period required by Section 8(d) of the Act. In short, there is no allegation that petitioner ever did anything which Congress defined as an unfair labor practice under Sections 8(a)(5) and 8(d) of the Act. 29 U.S.C. §158(a) and §158(d).

It is Congress which legislates; and in Section 8(d) of the Act, Congress has very specifically and clearly stated what it meant by the obligation "to bargain collectively" when it legislated that it would be an unfair labor practice for an employer "to refuse to bargain collectively." Notwithstanding the absence of any conduct by petitioner which could arguably fall within the parameters of Section 8(a)(5) and Section 8(d) of the Act, the Board found petitioner had violated Section 8(a)(5) by engaging in a blanket refusal to arbitrate grievances which did not arise until some eleven months after contract expiration. The Board reached this conclusion by relying on its then recent holding in *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987). Pet. App. B7. In *Indiana & Michigan*, the Board relied on *Nolde Brothers, Inc. v. Local 358, etc.*, 430 U.S. 243. The Court below "assume[d] without deciding that the Board's *Indiana & Michigan* decision is a reasonably

defensible construction of the Section 8(a)(5) duty to bargain." Pet. App. A18.

The Board's reliance on *Nolde Brothers, Inc.* is misplaced. *Nolde Brothers, Inc.* involved a civil action under Section 301(a) of the Act, 29 U.S.C. §185(a), brought by a union in a United States District Court to compel an employer to submit a dispute to arbitration. The *Nolde* Court specifically stated that "[o]nly the issue of arbitrability is before us." 430 U.S. at 244. By no stretch of the imagination can it be said the *Nolde* Court held that it was an unfair labor practice, a violation of Section 8(a)(5) of the Act, for an employer to refuse to arbitrate a post-contract expiration dispute. Congress, in Section 301(a), specifically provided that civil suits could be brought in district courts alleging violations of collective bargaining agreements. Congress did not choose to provide that a breach of a collective bargaining agreement would also be an unfair labor practice in violation of Section 8(a)(5). The Board has no authority to legislate in an area where Congress has declined to Act. It is up to Congress to decide what shall be the appropriate avenue for addressing an alleged breach of a collective bargaining agreement. By legislating such a clear and detailed definition of the unfair labor practice of refusing to bargain, while making available civil suits for breaches of collective bargaining agreements, Congress has made a clear choice. While it may be a breach of contract to refuse to follow the arbitration clause in a collective bargaining agreement, it is not an unfair labor practice.

Nolde Brothers, Inc. Should Be Modified Or, at Least, Narrowly Confined to the Facts in That Case.

The *Nolde* Court recognized the long-standing principle of labor-management relations law that the duty to arbitrate rests upon mutual consent:

> Our prior decisions have indeed held that the arbitration duty is a creature of the collective bargaining agreement and that a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so. 430 U.S. at 250.

Indeed, in the instant case, the Board stated, "[i]n the recently decided *Indiana & Michigan Electric Co.*, 284 NLRB No. 7 (May 29, 1987), we reaffirmed our conclusion in *Hilton-Davis Chemical Co.*, 185 NLRB 241 (1970), that 'the arbitration commitment arises solely from mutual consent and that Congress did not intend the National Labor Relations Act to operate to create a statutory duty to arbitrate.'" Pet. App. B5. No one disputes the law has always been that the obligation to arbitrate a dispute is based on mutual consent. *Nolde Brothers, Inc.* runs contrary to this long-standing case law.

Various statutory pronouncements of Congress are consistent with this long-standing case law. In defining the obligation to bargain collectively, in Section 8(d) of the Act, 29 U.S.C. §158(d), Congress specifically provided, ". . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." Further on, in Section 8(d) of the Act, Congress requires that a party to a collective

bargaining agreement not terminate or modify it without first giving appropriate notices and continuing it in full force and effect, without strike or lockout, for the 60-day notice period "or until the expiration date of such contract," whichever occurs later. If Congress requires a party continue "all the terms and conditions of the existing contract," including the arbitration provision, "in full force and effect, without resorting to strike or lockout" until the end of the 60-days notice period "or until the expiration of such contract," whichever is later, it seems logical Congress intended terminations or modifications could be made after "the expiration date of such contract." It is clear Congress had no hesitancy in recognizing "all the terms and conditions of the existing contract," including the arbitration provision, could be terminated upon contract expiration.

In Section 13 of the Act, 29 U.S.C. §163, Congress provided that "[n]othing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." But an agreement to arbitrate has long been recognized as the *quid pro quo* for the obligation not to strike. *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 455. It would follow, then, that under *Nolde Brothers, Inc.*, if an employer must arbitrate a grievance which arises eleven months after contract expiration, the union could not strike over the same dispute. This result runs contrary to Section 13 of the Act and most likely would shock most unions. Consequently, it seems more logical to conclude the union receives the advantages intended by Section 13 and may strike; and this being the case, the employer is under no obligation to arbitrate a post-contract expiration dispute.

In Section 201 of the Act, 29 U.S.C. §171, Congress states ". . . it is the policy of the United States that — . . . the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for . . . voluntary arbitration . . . ." An employer compelled against its will to arbitrate a dispute arising eleven months after expiration of the arbitration agreement is not engaged in "voluntary arbitration."

In Section 203(d) of the Act, 29 U.S.C. §173(d), Congress provided:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Where, as here, the parties have agreed that the provisions of a contract, including the arbitration provision, "shall be in effect" for the term of the agreement, and that term expires, yet the Board requires the provision setting forth a method for the final adjustment of disputes must remain in effect after contract expiration, the Board has not given proper recognition to the "method agreed upon by the parties." It is also noteworthy that Congress, in Section 203(d), referred to the settlement of disputes "arising over the application or interpretation of an existing collective-bargaining agreement." Congress did not state that the final adjustment of disputes arising over the application or interpretation of an *expired* collective bargaining agreement by a method agreed upon by the parties was the desirable method.

Nolde Brothers, Inc. is out of sync with the realities of the collective bargaining process. Many contracts contain a provision stating the contract will be in effect for the term of the agreement. Virtually all agreements contain a very specific duration clause. Contracts may run for 1, 2, or 3 years. Some run for 5 years. Frequently, the duration of the agreement is one of the most hotly-negotiated items. When the parties to a collective bargaining agreement specifically state in the agreement that its provisions shall be in effect for the term of the agreement, and that the agreement shall expire on a specified date, they surely intend for those provisions to mean something. They surely do not negotiate meaningless language. *Nolde Brothers, Inc.* is backwards as far as the realities of collective bargaining are concerned. *Nolde Brothers, Inc.* runs roughshod over clear, negotiated contract language dealing with termination dates and says to the the party declining to arbitrate a post-contract dispute, "in spite of your agreement that this contract and all of its provisions terminate on October 5, 1979, if you expect that agreement on termination to apply to one clause, the arbitration clause, you have to say so." It ought to be the opposite. The party pursuing the arbitration of a post-contract termination dispute, in the face of a clear contract termination clause, should bear the burden of proving the parties intended the arbitration clause to outlive the contract.

Nolde Brothers, Inc. spawns litigation and deprives the parties of the legal certainty essential to successfully conducting their respective operations. *Nolde Brothers, Inc.* always leaves open two questions: (1) Does the dispute "arise under" the collective bargaining agreement? (2) What role does the passage of time play? For example, in the instant case, the Board, deemed to be the expert in labor matters, concluded the layoff

grievances did not "arise under" the contract. Pet. App. B16. The Court below, however, decided the layoff grievances did "arise under" the contract. Pet. App. A22. In reaching that conclusion, the Court below noted, "[t]he Board and the courts have had considerable difficulty trying to develop a coherent set of principles for determining when a grievance 'arises under' the [collective bargaining agreement]." Pet. App. A19. The Court below then goes on to point out that "[s]ince the Board handed down its Decision and Order in the instant case, it has decided at least two other cases that conflict with its 'arising under' conclusion in the instant case." Pet. App. A19. Next, the Court below points out that the Board's "arising under" standard conflicts with the Court's own standard, which centers "its analysis on 'preserving the original intent of the parties' as to whether a particular type of grievance would have been arbitrable if circumstances unanticipated by the parties when the agreement was drafted had not arisen." Pet. App. A20-A21. The Court below characterized its approach as one where "we construed much more expansively the *Nolde* presumption of arbitrability of post-expiration grievances; rather than focusing on a narrow concept such as 'accrual' . . . ." Pet. App. A21. Meanwhile, the Court of Appeals for the Tenth Circuit has recently held that grievances based on seniority do not arise under an expired collective bargaining agreement. *United Food & Commercial Workers Union, AFL-CIO, Local 7 v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990). The role played by the passage of time between contract expiration and grievance events also provides a fruitful plain for litigation battles. The Court below rejected petitioner's contention there was no obligation to arbitrate post-expiration grievances because of the passage of time between contract expiration and grievance event. Pet. App. A16, n. 8. But other

Courts of Appeals have held that the passage of time does affect the applicability of the *Nolde* presumption. *Local 703, Int'l Bro. of Teamsters v. Kennecott Bros. Co.*, 771 F.2d 300 (7th Cir. 1985); *Chauffeurs, Teamsters and Helpers Local Union 238 v. C.R.S.T., Inc.*, 795 F.2d 1400 (8th Cir. 1986); *The O'Connor Company, Inc. v. Carpenters Local Union No. 1408*, 702 F.2d 824 (9th Cir. 1983).

The reasons relied upon in *Nolde Brothers, Inc.* in support of the conclusion that post-contract termination grievances are arbitrable are suspect. The *Nolde* Court expressed concern that adherence to the "arbiration is based on mutual consent" rule would logically preclude post-contract arbitration even when the grievance facts arose during the contract term. 430 U.S. at 251. But no one in the *Nolde* case took that position, as the Court itself noted. 430 U.S. at 251. To argue a result might occur, which "could not seriously be contended" would occur, should arbitration not be ordered, seems to be a weak argument. 430 U.S. at 251. The *Nolde* Court next attached significance to the holding in *John Wiley & Sons v. Livingston*, 376 U.S. 543. But *John Wiley* was a case where the grievance facts occurred while the collective bargaining agreement was still in effect, which the *Nolde* Court acknowledged. 430 U.S. at 252. The most important fact which could distinguish one case from another would be that in one case the grievance facts took place before contract expiration, while in the second case those facts occurred after contract termination. Relying on a case so readily distinguishable does not seem to be persuasive. Next, the *Nolde* Court argued the parties did not include language expressly excluding from arbitration those disputes arising after contract termination. The *Nolde* Court reasoned that in the absence of such language, there were strong reasons to

conclude the parties did not intend the arbitration obligation to end with the term of the agreement. 430 U.S. at 252-253. But it could just as easily be said that because the parties did not expressly provide for the arbitration of post-contract termination disputes, they did not intend to arbitrate such disputes. The *Nolde* Court's contention is no more compelling than the contrary argument. In reality, the likely reason the parties in *Nolde* did not expressly provide for post-contract termination arbitration is because they never dreamed such language was required. Most likely, they believed the rather detailed contract termination language which they did agree to was sufficient. 430 U.S. at 246. In 1966, the U. S. Department of Labor surveyed "virtually all agreements in the United States covering 1,000 workers or more," excluding railroad, airline and government agreements. Not one agreement contains language expressly negating the obligation to arbitrate post-contract termination grievances. It is doubtful that virtually every such employer in the United States with a collective bargaining agreement containing an arbitration clause intended the clause to outlive the agreement. What is more likely is no one thought such express language was necessary. *Major Collective Bargaining Agreements, Arbitration Procedures*, Bulletin No. 1425-6, United States Department of Labor (1966). The *Nolde* Court next argued the parties clearly expressed their preference for an arbitral, rather than a judicial interpretation of the collective bargaining agreement because " '[t]he labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment . . . .' " 430 U.S. at 253. Actually, in most cases, a panel of arbitrators is furnished to the parties by either the American Arbitration Association or the

Federal Mediation and Conciliation Service, together with considerable biographical information regarding each member of a panel. *Major Collective Bargaining Agreements, Arbitration Procedure,* Bulletin No. 1425-6, United States Department of Labor (1966), p. 36-37. The parties then seek to find out how the arbitrators on the panel have ruled on other cases, and whether any arbitrator has ruled for or against any party in the past. Those who appear to lean against the union are struck from the panel by the union; those leaning against the employer are struck by the employer. AAA or FMCS then appoints an arbitrator from those left on the panel. So it is very rare that the parties chose an arbitrator because of their confidence and trust in him or her. In reality, each party is trying to obtain an arbitrator who will be favorable to its side.

The *Nolde* Court's final argument was that national policy favors arbitration and the parties "must be deemed to have been conscious of this policy when they agree to resolve their contractual differences through arbitration." 430 U.S. at 255. But it is also national policy that the parties, and not the government, determine what goes into a collective bargaining agreement. It is national policy that the law does not compel either employer or union to agree to any proposal or require the making of a concession. *Nolde Brothers, Inc.* requires an employer to either (1) submit to post-contract termination arbitration when it may not wish to do so, or (2) attempt to obtain the union's agreement that disputes based on facts occurring after contract termination are not arbitrable. The response of most unions to such a request would be a demand for something in return. In other words, a concession would have to be made by the employer on, most likely, some other issue all because of government intervention. True, there is a national

policy favoring arbitration, but it is arbitration by mutual consent, in accordance with the long-standing precedent that the arbitration duty is a matter of mutual consent. 430 U.S. at 250-251. There is also a national policy protecting the right to strike, probably the most guarded right unions possess. But, if an employer must arbitrate grievances arising months after contract termination, does not the union lose its right to strike over such grievances? There is also a national policy favoring "voluntary" arbitration and that the "method agreed upon by the parties" for settling disputes arising under collective bargaining agreements is the "desirable method." 29 U.S.C. §171, §173(d). A party compelled by court order to arbitrate a post-contract termination dispute is not engaged in "voluntary" arbitration. A party arbitrating a post-contract termination dispute under court order is not utlizing a "method agreed upon by the parties."

For the foregoing reasons, *Nolde Brothers, Inc.* should be modified as follows:

1. There is no obligation to arbitrate grievances based on facts which occur subsequent to contract termination, except as follows: grievances involving contract entitlements generally regarded as compensation for services already rendered are arbitrable, including such entitlements as wages, pension benefits, severance pay, sick leave pay and vacation pay. These items are almost always carried "on the books" of an employer and are viewed as a form of deferred compensation for services rendered over a period of time.

2. Grievances based on facts occurring prior to contract expiration are arbitrable, even though the grievance is filed after such expiration.

3. Any party seeking to arbitrate any other post-contract expiration grievance must prove, by clear and convincing evidence, that the parties intended to continue the arbitration provision in effect after contract termination.

These modifications will leave us with a scheme which keeps faith with the principle that arbitration is based on mutual assent and is consistent with our national policy that the parties to a collective bargaining agreement — and not the government — should determine what goes into it. This scheme will accurately reflect what the parties believe they are negotiating when they negotiate termination clauses. It will protect the unions' right to strike, provide legal certainty and substantially reduce litigation over the "arising under" standard and the role of the passage of time. In short, it will work. *Nolde Brothers, Inc.* has not.

At the very least, *Noldè Brothers, Inc.* should be narrowly confined to its own facts, being applicable only to disputes over rights which are clearly accrued or vested and to cases where the grievance facts occur shortly after contract expiration. The *Nolde* Court expressly pointed out the union's contention "that the severance wages provided for in the collective bargaining agreement were in the nature of 'accrued' or 'vested' rights, earned by employees during the term of the contract on essentially the same basis as vacation pay, but payable only upon termination of employment." 340 U.S. at 248. The *Nolde* Court accepted that contention:

> The fact that the amount of severance pay to which an employee is entitled under the collective bargaining agreement varies according to the length of his employment and the amount of his salary also supports the Union's position that severance pay was nothing more than deferred compensation. 340 U.S. at 248, n. 4.

The *Nolde* Court, itself, appeared to have limited its holding to cases where, as in *Nolde,* the grievance fact occurred shortly after contract expiration:

> ". . . we need not speculate as to the arbitrability of post-termination contractual claims which, unlike the one presently before us, are not asserted within a reasonable time after the contract's expiration." 340 U.S. at 255, n. 8.

The right to layoffs based on other things such as aptitude and ability, and seniority only where other things such as aptitude and ability are equal, is not an accrued or vested right. It is not deferred compensation. There is a vast difference between the 4 days' passage of time in *Nolde* and the more than eleven months' passage of time in the case presently before the Court. Confined to its intended limits, *Nolde* provides no basis for the Board's finding petitioner violated Section 8(a)(5) of the Act.

The Grievances in the Instant Case Did Not "Arise Under" the Expired Collective Bargaining Agreement.

It seems almost sacrilegious to say seniority status is not an accrued or vested right. Nevertheless, some cases so hold. *United Food & Commercial Workers International Union, AFL-CIO, Local 7 v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990). What is clear is that the *role* which seniority status plays in a collective bargaining agreement is not an accrued or vested right. Seniority may be carried on an employer's books in the form of a "seniority list," but the role which that seniority will play in such things as layoffs, promotions, transfers, shift assignments, overtime assignments, and the assignment of vacation time is not an accrued or vested right. Provisions on layoffs, promotions, transfers, shift assignments, overtime assignments and assignment of vacation times are frequently modified to change the role played by seniority in those areas. If the role of seniority is "vested," however, those provisions could not be changed and the process of collective bargaining would be seriously stifled. In any event, in the instant case, petitioner did not take away the *seniority* of any employee. At the very most, petitioner could be accused of changing the *role* played by seniority under the expired collective bargaining agreement (which petitioner does not concede it did). This being the case, the union's grievance in the instant case did not "arise under" the expired agreement. Thus, even if the *Nolde Brothers, Inc.* and *Indiana & Michigan* "arise under" standard prevails, the dispute here did not "arise under" the expired contract.

Moreover, in the instant case, the expired collective bargaining agreement did not provide that layoffs would

be made on the basis of strict seniority. Rather, the parties agreed that "in case of layoffs, lengths of continuous service will be the determining factor if *other things such as aptitude and ability are equal.*" (Emphasis added.) J.A. 30. There are many "other things" which an employer might reasonably consider in determining the order of layoff: skill, experience, physical fitness, previous training, previous service on the job, knowledge, general performance, attendance, adaptability to do other work in the plant, future potential, education and quality of work. A small number of agreements also call for the consideration of family status, number of dependents and place of residence. *Major Collective Bargaining Agreements, Layoff, Recall and Worksharing Procedures,* Bulletin 1425-3, U.S. Department of Labor (1972), p. 33-35. Add the "aptitude and ability," specifically spelled out in the expired agreement, to the "other things" suggested above, and it is clear the layoff provision in the collective bargaining agreement conferred no "vested" right on employees. Aptitude, ability and many of the "other things" vary from day to day and may actually decrease as length of service increases and cannot be accrued. Consequently, even under the *Nolde Brothers, Inc.* and *Indiana & Michigan* "arises under" standard, the grievances filed by the union over the layoffs did not "arise under" the expired contract and are not arbitrable.

In its opinion, the Court below reversed the Board's finding that the grievances did not "arise under" the expired agreement, concluding, "[s]ince the Board handed down the Decision and Order in the instant case, it has decided at least two other cases that conflict with its 'arising under' conclusion in the instant case." Pet. App. A19. The Court below cited *United Chrome Products, Inc.*, 288 NLRB 1176 (1988), and *UPPCO,*

Inc., 288 NLRB 937 (1988). Pet. App. A20. The Court below also concluded the Board had failed to explain why the consideration of aptitude and ability prevent arbitrability. Pet. App. A20, n. 9. In its Decision and Order, however, the Board, in declining to order arbitration, did explain, "[t]he right to lay off by seniority if other factors such as ability and experience are equal is not 'a right worked for or accumulated over time.' *Indiana & Michigan, supra,* slip. op. at 23." Pet. App. B16. Further, in *United Chrome Products, Inc., supra,* the Board specifically distinguished its decision and order in the instant case by explaining that consideration of aptitude and ability preclude arbitration because aptitude and ability do not "arise under" a contract. 288 NLRB at 1177. The contention of the Court below that the Board had not "explain[ed] why consideration of 'aptitude and ability' prevent arbitrability" (Pet. App. A20, n. 9) is ill-founded. The Court below also relied upon *Local Jt. Exec. Bd. of Las Vegas Culinary Workers Union, Local 226 v. Royal Center, Inc.*, 796 F.2d 1159 (9th Cir. 1986), *cert. denied,* 479 U.S. 1033 (1987), *George Day Construction Co. v. United Bhd. of Carpenters and Joiners of America, Local 354*, 722 F.2d 1471 (9th Cir. 1984) and *O'Connor v. Carpenters Local Union No. 1408*, 702 F.2d 824 (9th Cir. 1983). *George Day* is not applicable, because there the employer *submitted* the arbitrability question to the arbitrator, lost the case, then sought to argue the grievance was not arbitrable. The Court specifically held that "By consenting to the arbitrator's consideration of the arbitrability question, the parties bound themselves to his decision." 722 F.2d at 1479. In *Royal Center,* the collective bargaining agreement had in fact never expired even though, in dicta, the Court said that fact made no difference in its decision. The case also turned upon a specific contractual clause obligating Royal Center to

obligate any purchaser of its business to assume its collective bargaining agreement. The Court reasoned the parties must have intended such an agreement to survive any contract termination which might occur automatically as the result of a sale of the business; otherwise, the clause would be meaningless. 796 F.2d at 1163. In *O'Connor,* the Court stated:

> The Union contends that even though the collective bargaining agreement had terminated, the obligation to arbitrate continued, even as to matters occurring after termination of the agreement.
>
> . . . .
>
> The question now before the Court is whether the Company in this case had a continuing obligation to arbitrate grievances which arose after the expiration of the collective bargaining agreement. This question must be answered in the negative.
>
> . . . .
>
> The Union's position in this case is untenable because the labor dispute involved here arose following termination of the old contract and was not covered by that contract. 702 F.2d at 825.

In *O'Connor,* the court specifically noted the contract expired June 15, 1980 and the grievance concerned a complaint arising on March 31, 1981. 702 F.2d at 825. Obviously, time passed between those two dates and the grievance could not "be covered by that contract" because "that contract" no longer was in existence.

Specific Contract Language Adequately Negates the *Nolde* Presumption.

Even under *Nolde Brothers, Inc.*, the presumption favoring arbitrability may be "negated expressly or by clear implication." 430 U.S. at 255. Here, the expired agreement:

1. Started out by stating, "the stipulations set forth below shall be in effect for the time hereinafter specified (which turned out to be October 5, 1979)." Surely the parties meant something when *they agreed to this language*. J.A. 22.
2. Included a duration or termination clause. Surely the parties meant something when *they agreed that the contract would terminate on a certain date*. J.A. 44, 53.
3. Included a specific no-strike clause providing there would be no strike "during the term of this agreement." Thus, there was no *quid pro quo* for an arbitration obligation when the no-strike clause expressly expired after the term of the agreement. Surely the parties never intended that the union could strike, but petitioner had to arbitrate, over post-contract termination disputes. J.A. 34.
4. Contained an "interest arbitration" provision, *i.e.*, one providing that, if the parties could not agree upon a

successor agreement to the one which was due to expire on October 5, 1979, they would submit any unresolved issues to an arbitrator. Thus, the parties *knew* how to write a clause providing for the arbitration of issues outside the normal arbitration clause, but did not do so with respect to contract disputes which might arise after contract termination. This justifies an inference the parties had no intention that the normal arbitration clause would outlive the term of the agreement. J.A. 53-55, Tr. 9, 10.

CONCLUSION

The refusal to arbitrate a dispute which arises months after the expiration of the collective bargaining agreement containing the arbitration obligation simply does not fall within the very specific definition of refusing to bargain set forth in Section 8(d) adopted by Congress. To put it bluntly, the Board has legislated its own version of an unfair labor practice. Petitioner requests the Court to reverse the finding of the Court below that petitioner violated Section 8(a)(5) of the Act.

Should the Court find it necessary or appropriate to analyze or discuss *Nolde Brothers, Inc.*, petitioner requests the Court to modify its holding, as suggested earlier in this brief at pages 23-24, thereby providing employers and unions with a workable rule which will be consistent with (1) the concept that arbitration is based on mutual consent, (2) the national policy that the parties should determine what goes into a collective bargain- ing agreement — not the government, (3) the

national policies favoring voluntary arbitration and the right to strike, (4) the realities of collective bargaining and, lastly, such a rule will result in less litigation. Petitioner requests the Court to reverse the Section 8(a)(5) finding of the Court below upon a re-examination of *Nolde Brothers, Inc.*

If *Nolde Brothers, Inc.* stands as is, petitioner requests the Court to reverse the Section 8(a)(5) finding of the Court below. First, the layoff clause, based on several factors which are not accrued or vested, conferred no rights on employees of a vested nature. Thus, the dispute which the union sought to arbitrate did not "arise under" the expired contract. The Board was correct in this regard, and the Court is requested to defer to its expertise. It is a fair assumption that the Board possesses more expertise in labor relations matters than the Court below. Lastly, the passage of eleven months makes the *Nolde* presumption of doubtful validity.

Second, by clear implication, the parties never intended the arbitration provision to outlive the collective bargaining agreement.

Respectfully submitted,

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Litton Financial Printing Division,
A Division of Litton Business
Systems, Inc.

(6)

No. 90-285

In the Supreme Court of the United States

OCTOBER TERM, 1990

LITTON FINANCIAL PRINTING DIVISION,
A DIVISION OF LITTON BUSINESS SYSTEMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS RESPONDENT SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that the union's post-contract expiration grievances about the employer's layoff of employees were not arbitrable under the contract.

II

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Printing Specialties District Council No. 2, as successor to Printing Specialties District Council No. 1, was a petitioner/intervenor in the court of appeals and is a respondent here.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 893 F.2d 1128. The decision and order of the National Labor Relations Board (Pet. App. B1-B28) are reported at 286 N.L.R.B. 817.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1990. A petition for rehearing was denied on May 31, 1990. Pet. App. D1-D2. The petition for a writ of certiorari was filed on August 14, 1990, and was granted on November 13, 1990.[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] This Court granted the petition limited to the second question presented. See J.A. 3.

STATUTORY PROVISIONS INVOLVED

Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), provides:

> (a) It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(d) of the Act, 29 U.S.C. 158(d), provides in relevant part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

Section 7 of the Act, 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

STATEMENT

A. The Development Of The Board's Rule Regarding Arbitration Of Post-Contract Expiration Grievances

1. Under Sections 8(a)(5) and 8(d) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and 158(d), an employer must bargain "in good faith with respect to wages, hours, and other terms and conditions of employment." *Ibid.* In order to promote industrial peace by fostering an atmosphere conducive to serious negotiations on a new contract, the Board has long recognized that the expiration of a collective bargaining agreement generally freezes the existing terms and conditions of employment. See *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962). Consequently, the Board's well-established rule provides that an employer may not, without first bargaining to impasse, unilaterally abrogate an existing contractual grievance procedure, nor may it refuse to process grievances under the procedure, even after the contract has expired.[2] As the Board has observed, such unilateral actions undermine a union's status as exclusive bargaining representative of the

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[2] See, *e.g.*, *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. 53, 54-55 (1987); *Lucas County Farm Bureau Coop. Ass'n*, 218 N.L.R.B. 1150, 1151 (1975), enforced, 557 F.2d 1227, 1228 (6th Cir. 1977); *Celotex Corp.*, 146 N.L.R.B. 48, 59-60 (1964), enforced, 364 F.2d 552, 554 (5th Cir.), cert. denied, 385 U.S. 987 (1966); *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1503 (1962), enforced in relevant part, 320 F.2d 615, 620 (3d Cir. 1963), cert. denied, 375 U.S. 984 (1964).

employees. *Hilton-Davis Chem. Co.*, 185 N.L.R.B. 241, 243 (1970).

Union security and dues-checkoff clauses do not survive, by operation of the Act, expiration of the collective bargaining agreement because "[t]he acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which conforms to the proviso to Section 8(a)(3)." *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1502 (1962); see *Southwestern Steel & Supply, Inc.* v. *NLRB*, 806 F.2d 1111, 1113 (D.C. Cir. 1986). The Board initially held that arbitration clauses in collective bargaining agreements likewise did not survive expiration of the contract, on the ground that the duty to arbitrate is wholly contractual and cannot survive by operation of law. *Hilton-Davis Chem. Co.*, 185 N.L.R.B. at 242.[3] The Board therefore concluded that an employer does not violate Section 8(a)(5) of the Act by refusing to arbitrate grievances arising between the expiration of one contract and agreement on another. *Ibid.*[4] As the Board there explained:

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[3] In *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), this Court recognized that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Accord *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 374 (1974); see also *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 57-58.

[4] On the other hand, the Board has long held that a wholesale refusal to arbitrate grievances under a contract to arbitrate does violate Section 8(a) (5), since that refusal amounts to a repudiation of part of the bargain reached during negotiations. See, *e.g.*, *GAF Corp.*, 265 N.L.R.B. 1361, 1364 (1982); *Paramount Potato Chip Co.*, 252 N.L.R.B. 794, 796-797 (1980); *Independent Stave Co.*, 233 N.L.R.B. 1202, 1204 (1977), enforced in pertinent part, 591 F.2d 443, 446-448 (8th Cir.), cert. denied, 444 U.S. 829 (1979). However, a refusal to arbitrate a particular grievance or class of grievances, by itself, is not a violation of the Act, because a breach of contract does not automatically amount to a repudiation of the contract. See, *e.g.*,

> Absent mutual consent, the parties revert to the statutory scheme of "free" collective bargaining wherein each party must attempt in good faith to reach agreement, but is under no statutory mandate to reach an agreement or to forfeit its rights to utilize its economic power if no agreement can be achieved.

Ibid. The Board accordingly took the position that "[i]f the contract expires, the arbitration commitment expires." *S & W Motor Lines, Inc.*, 236 N.L.R.B. 938, 948 (1978), modified on other grounds, 621 F.2d 598 (4th Cir. 1980).

2. In *Nolde Bros.* v. *Local No. 358, Bakery Workers*, 430 U.S. 243, 250-251 (1977),[5] this Court reaffirmed "that the arbitration duty is a creature of the collective-bargaining agreement and that a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so." See, *e.g.*, *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Nonetheless, the Court held that "termination of a collective-bargaining agreement [does not] automatically extinguish[ ] a party's duty to arbitrate grievances arising under the contract." 430 U.S. at 251.

The Court noted that "[w]hile the termination of the collective-bargaining agreement works an obvious change in the relationship between employer and union, it would have little impact on many of the considerations behind [the parties'] decision to resolve their contractual differences through arbitration." *Nolde*, 440 U.S. at 254. The

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Indiana & Michigan Elec. Co., 284 N.L.R.B. at 60 n.7; *GAF Corp.*, 265 N.L.R.B. at 1364-1365; *Central Rufina*, 161 N.L.R.B. 696, 700 (1966); *United Tel. Co.*, 112 N.L.R.B. 779, 781-782 & n.4 (1955).

[5] *Nolde* involved a union's action under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, to compel arbitration of a dispute over severance pay that arose after the expiration of the collective bargaining agreement. 430 U.S. at 244-248.

Court further observed that "the parties drafted their broad arbitration clause against a backdrop of well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective-bargaining agreements," and the "established * * * strong presumption favoring arbitrability" in order to effectuate that policy. *Ibid.* The Court therefore concluded that

> [t]he parties must be deemed to have been conscious of this policy when they agree[d] to resolve their contractual differences through arbitration. Consequently, the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship. In short, where the dispute is over a provision of the expired agreement, the presumption favoring arbitrability must be negated expressly or by clear implication.

Id. at 255.

In light of *Nolde,* the Board reconsidered the rule announced in *Hilton-Davis* that the duty to arbitrate expires with the contract. In *American Sink Top & Cabinet Co.,* 242 N.L.R.B. 408 (1979), the Board held that the employer had violated Section 8(a)(5) and (1) of the Act by refusing to process—and arbitrate, if appropriate—a grievance over a discharge occurring nearly three months after the contract expired. On the basis of the presumption adopted in *Nolde,* the Board explained that "[t]he grievance's basis is 'arguably'—at least—the contract, and there is no reason to conclude that the parties had intended the arbitration provisions to end with the contract's term." 242 N.L.R.B. at 408.

In the wake of *American Sink Top,* the Board had difficulties applying its decisions regarding the post-expiration duty to arbitrate grievances. Compare *Cardinal Operating Co.,* 246 N.L.R.B. 279, 284, 287-288 (1979) (applying *Hilton-Davis* without citing *American Sink Top* or *Nolde*) with *Digmor Equip. & Eng'g Co.,* 261 N.L.R.B. 1175, 1175-1176 (1982) (applying *American Sink Top* where employer refused to arbitrate post-expiration discharge based in part on pre-expiration conduct).

3. This uncertainty led the Board, in *Indiana & Michigan Elec. Co.,* 284 N.L.R.B. 53 (1987), to clarify its rule regarding the post-expiration duty to arbitrate grievances. The Board noted *Nolde*'s strong presumption that the contractual obligation to arbitrate grievances arising under the contract extends to post-expiration disputes,[6] and concluded that a blanket refusal to arbitrate post-expiration grievances would violate Section 8(a)(5) and (1) of the Act, absent strong evidence that the parties intended to exclude all such disputes from arbitration. 284 N.L.R.B. at 59-60. But the Board read *Nolde* as requiring an employer to arbitrate only those post-expiration grievances "arising under" the expired contract, *i.e.,* disputes concerning "contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." *Id.* at 60. Accordingly, to the extent *American Sink Top* suggested that *all* post-expiration grievances based on terms of the expired contract are arbitrable, the Board declined to follow that decision. *Id.* at 60 n.9.[7]

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[6] In this regard, the Board determined that *Nolde* did not undermine that aspect of *Hilton-Davis* holding that the Act does "not impose a duty to adhere to the arbitration procedure independent of any contractual commitment to do so." 284 N.L.R.B. at 58.

[7] In *Indiana & Michigan Elec. Co.,* the Board concluded that the employer had violated the Act by refusing to arbitrate any post-

B. The Present Controversy

1. Petitioner prints bank checks at six plants. For a number of years, petitioner and Printing Specialties District Council No. 2 (union) were parties to collective bargaining agreements.[8] During the period relevant to this proceeding, the union represented production and maintenance employees at petitioner's Santa Clara facility. The last contract between petitioner and the union expired on October 5, 1979. Pet. App. A4.

That contract, which generally provided that "the stipulations set forth shall be in effect for the time hereinafter specified," J.A. 22, contained a grievance-arbitration procedure for resolving "[d]ifferences that may arise between the parties * * * regarding this Agreement and any alleged violations of the Agreement, [and] the construction to be placed on any clause or clauses of the Agreement," J.A. 34.[9] With respect to layoffs, the contract provided that

expiration grievances. 284 N.L.R.B. at 61. The Board determined, however, that the grievances at issue did not "arise under" the expired contract and thus declined to order the employer to arbitrate them. The Board pointed to the fact that the

> grievances were triggered by events or conduct that occurred after the expiration of the contracts. None of the rights invoked were worked for or accumulated over time, and there is no other indication that the parties contemplated that such rights could ripen or remain enforceable after the contracts expired.

Ibid.

[8] The union was the successor to Printing Specialties District Council No. 1. Pet. App. A4.

[9] The contract calls for the employee first to submit the grievance to his immediate supervisor (or the Shop Steward), and then to submit it in writing to a panel consisting of the Plant Manager, the Shop Steward, and a union representative. If the grievance remains unresolved, the parties may then proceed to binding arbitration. J.A. 34-35.

The contract provides that "[s]hould an employee have a grievance as to the interpretation or application of the terms of this Agreement,

> [w]henever [petitioner] intends to lay off all or part of [its] employees, [it] shall give notice of such intention not later than quitting time of the previous working day. It is also understood that in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal.

J.A. 30.

Petitioner used two types of printing processes to print bank checks at the Santa Clara facility—the "cold-type" process and the "hot-type" process. In July 1980, petitioner decided for economic reasons to convert the facility entirely to the "hot-type" process and, as a result, laid off ten employees and gave them severance pay. Petitioner did not notify the union about the layoffs or give it an opportunity to bargain.[10] Moreover, petitioner did not lay off those employees on the basis of seniority. Instead, petitioner laid off employees who worked exclusively or primarily on the "cold-type" equipment. Pet. App. A4-A5.

The union filed separate but identical grievances for each laid-off employee, alleging "unjust layoff . . . out of seniority." Pet. App. A6. The union asked petitioner for a meeting to discuss the layoff decision and its impact on the employees, and "request[ed] that pending resolution of this matter that each and all of them be reinstated to their employment." J.A. 61. Petitioner, noting that the contract

there shall be no suspension or interruption of work on account of such matter * * *." J.A. 34-35. The contract also contains a general "no-strike" clause limited to the "term of [the] Agreement." J.A. 34.

[10] At the time of the layoffs, petitioner was refusing to bargain with the union, relying on its objections to the 1979 decertification election that the union had won. In a separate proceeding, the Board found that petitioner's general refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). *Litton Financial Printing Division*, 256 N.L.R.B. 516 (1981).

had expired, refused to process the grievances under the contractual grievance and arbitration procedure. It also refused to bargain over the decision to lay off the employees, but offered to discuss the "effects" of the layoff on employees. Pet. App. A6; J.A. 65.

2. In response to unfair labor practice charges initiated by the union, see J.A. 7-9, the National Labor Relations Board concluded that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain about the layoff decision, by refusing to accept and process the layoff grievances, and by unilaterally repudiating the contractual arbitration procedure. Pet. App. B1-B20.[11] The Board noted that, under *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981), "employers are obligated to bargain over the effects on unit employees of management decisions" even where those decisions "are not themselves subject to the obligation to bargain." Pet. App. B9. "[U]nder the facts of this case," the Board determined, petitioner's "decision to lay off employees [was] not so inextricably intertwined with the conversion decision as to render impossible bar-

[11] The Board also concluded that petitioner had violated Section 8(a)(5) and (1) by dealing directly with employees without first notifying the union. Pet. App. B2 n.4. Since petitioner did not challenge that conclusion, the court of appeals summarily enforced that aspect of the Board's order. *Id.* at A5 n.2. That issue is not before this Court.

Chairman Dotson filed a dissenting opinion. Pet. App. B21-B28. In his view, there was insufficient evidence "to establish [petitioner's] 'wholesale repudiation' of the arbitration procedure." *Id.* at B23. With respect to the employees' grievances, he concluded that since they "did not 'arise under' the contract, * * * [petitioner] had no obligation * * * to process them." *Id.* at B24. Moreover, Chairman Dotson determined that, "under all the circumstances presented * * *, the layoff may not properly be classified as an effect of [petitioner's] conversion decision." *Ibid.*

gaining over the layoff decision." *Ibid.*[12]

Following its recent decision in *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. 53 (1987), the Board also concluded that petitioner had violated Section 8(a)(5) and (1) by refusing to accept and process the layoff grievances and by unilaterally repudiating the contractual arbitration procedure. Pet. App. B5-B9. In light of *Indiana & Michigan Elec. Co.*, the Board here rejected petitioner's contention that there was no obligation to process the grievances through the grievance procedure because the contract had expired. Moreover, the Board concluded that petitioner could not repudiate the arbitration provisions of its expired contract merely because the contract specified that the "stipulations set forth shall be in effect for the time hereinafter specified." Pet. App. B3; see *id.* at B5-B6. The Board pointed out that such language "is not sufficient to rebut the *Nolde* presumption of arbitrability because it does not reveal the parties' intentions 'as to the pertinent issue, which is, whether the arbitration clause *survives* expiration and, if so, which post-contract grievances are arbitrable.' " *Id.* at B6 (quoting *Teamsters Local 703* v. *Kennicott Bros. Co.*, 771 F.2d 300, 303 (7th Cir. 1985) (emphasis in original)).

Turning to the appropriate remedy, the Board, among other things, ordered petitioner (upon request) to bargain about the layoffs and to process the layoff grievances through the contractual grievance procedure. Pet. App. B15-B17, B18-B19. But the Board refused to order peti-

[12] The Board found that once petitioner decided to convert to the hot-type process, it had a number of alternatives—other than layoffs—for implementing that decision: petitioner could have retained cold-type employees to work on hot-type equipment, transferred those employees to its other plants or to other positions within the same plant, reduced the workweek for all employees, or adopted a system of rotating layoffs. Pet. App. B10.

tioner to arbitrate the layoff grievances, rejecting the union's contention that those grievances "arose under" the expired contract. The Board found that the layoffs that triggered the grievances occurred after the expiration of the contract, that the asserted contractual right—the right to layoff by seniority if other factors were equal—was not a "right worked for or accumulated over time," and that there was no evidence that "the parties contemplated that such rights could ripen or remain enforceable even after the contract expired." *Id.* at B16 (quoting *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 60).

3. The court of appeals enforced the Board's order, but reversed and remanded for further proceedings that aspect of the Board's decision concluding that the layoff grievances were not arbitrable. Pet. App. A1-A22.[13] Reviewing the Board's conclusion that the layoff grievances did not "arise under" the expired contract, the court of appeals determined that the Board had erroneously focused on "the event (the layoff) that sparked the dispute, and not [on] the substantive contract-based rights (seniority protection against layoff) that were allegedly violated." *Id.* at A19. The court pointed out that, in two later decisions,[14] the Board had found post-expiration disputes involving application of contractual seniority clauses arbitrable; the court viewed those decisions as inconsistent with the Board's holding here. *Id.* at A19-A20. Moreover, the court concluded that the Board's *Indiana & Michigan* rule, by

[13] The court of appeals upheld the Board's determination that petitioner's layoff decision was a mandatory subject of bargaining, and thus enforced that part of the Board's order. Pet. App. A11-A12. That aspect of the court of appeals' judgment is not before the Court as a result of the limited grant of certiorari. See J.A. 3; note 1, *supra*.

[14] *United Chrome Prods., Inc.*, 288 N.L.R.B. 1176 (1988); *Uppco, Inc.*, 288 N.L.R.B. 937 (1988).

focusing on whether the grievance was based on rights accruing under the contract before termination, was inconsistent with *Nolde* as well as with Ninth Circuit decisions construing Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185. Pet. App. A20-A21 (citing, *e.g.*, *Local Joint Executive Bd., Culinary Workers Union, Local 226* v. *Royal Center, Inc.*, 796 F.2d 1159 (9th Cir. 1986), cert. denied, 479 U.S. 1033 (1987)).[15]

SUMMARY OF ARGUMENT

A. This Court has repeatedly held that "[i]f the Board adopts a rule that is rational and consistent with the Act * * * then the rule is entitled to deference from the courts." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987). Deference is appropriate where the Board's decision is based on a policy judgment designed to implement the broad purposes of the statute. "It is the Board," not the courts, "on which Congress conferred the authority to develop and apply fundamental national labor policy." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500 (1978). If the Board is to accomplish that task, it "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Id.* at 501. Deference is particularly due the Board's remedial order, which "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those

[15] Since it concluded that the Board "erred" in finding that "the layoff grievances in this case were not arbitrable, on the ground that they did not 'arise under' the expired [contract]," the court of appeals "assume[d] without deciding that the Board's *Indiana & Michigan* decision [insofar as it relies on Section 301 precedent such as *Nolde*] is a reasonably defensible construction of the section 8(a)(5) duty to bargain." Pet. App. A18. As the court of appeals pointed out, petitioner did "not challenge the general principles of *Indiana & Michigan*." *Id.* at A16 n.8.

which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943).

B. The Board's rule set forth in *Indiana & Michigan Elec. Co.* regarding arbitration of post-contract expiration grievances is plainly "rational and consistent with the Act." *Fall River Dyeing*, 482 U.S. at 42. In view of this Court's recognition in *Nolde* of the strong presumption that the contractual obligation to arbitrate grievances arising under the contract extends to post-expiration disputes, the Board has properly determined that a blanket refusal to arbitrate post-expiration grievances would violate the Act, absent strong evidence that the parties intended to exclude such disputes from arbitration. That aspect of the Board's rule is unexceptionable, especially in view of the scope of the duty to bargain under Section 8(a)(5) of the Act.

The Board has appropriately determined that only those post-expiration grievances concerning "contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires" must be arbitrated under the contract. *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 60. That limitation reflects the Board's "striking [a] balance to effectuate national labor policy." *NLRB* v. *Truck Drivers*, 353 U.S. 87, 96 (1957). The Board's rule furthers the use of arbitration as a means of resolving labor-management disputes, but at the same time recognizes that resort to arbitration over particular disputes ultimately depends on the parties' mutual consent, as reflected in the collective bargaining agreement. Accordingly, to the extent the court of appeals concluded that the Board's rule is an impermissible construction of the Act, the decision below is wrong.

C. Under the *Indiana & Michigan* rule, the Board here reasonably determined that, although petitioner's blanket refusal to arbitrate the union's post-contract expiration grievances violated the Act, petitioner was not obligated to arbitrate the particular layoff grievances at issue since they did not "arise under" the contract. The record adequately supports the Board's determination, and contrary to the court of appeals' conclusion, the Board's decision in this case is consistent with its other recent decisions applying the *Indiana & Michigan* rule. The court of appeals therefore erred in refusing to uphold that aspect of the Board's order declining to direct arbitration of the layoff grievances.

ARGUMENT

THE NATIONAL LABOR RELATIONS BOARD REASONABLY DETERMINED THAT THE UNION'S POST-CONTRACT EXPIRATION GRIEVANCES ABOUT THE EMPLOYER'S LAYOFF OF EMPLOYEES WERE NOT ARBITRABLE UNDER THE CONTRACT

A. The Board's Interpretations Of The Act And Exercise Of Remedial Authority Are Entitled To Substantial Deference If They Are Rational And Consistent With The Statute

"The function of striking [the] balance to effectuate national labor policy is often a difficult and delicate responsibility, which Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers*, 353 U.S. 87, 96 (1957); see *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 501 (1978). Accordingly, the Board's judgment, when "applying the general provisions of the Act to the complexities of industrial life," *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963), is entitled to "considerable deference," *Curtin Matheson*, 110 S. Ct. at 1549. As this

Court has repeatedly held, "[i]f the Board adopts a rule that is rational and consistent with the Act * * * then the rule is entitled to deference from the courts." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); accord *Curtin Matheson*, 110 S. Ct. at 1549; *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404, 413 (1982); *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495, 497 (1979); *Beth Israel Hosp.*, 437 U.S. at 500-501.[16]

As this Court has stressed, deference is required when the Board's decisions are based on policy judgments designed to effectuate the broad purposes of the statute. See, *e.g.*, *Curtin Matheson*, 110 S. Ct. at 1542. "It is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy," and if the Board is to accomplish that task it "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hosp.*, 437 U.S. at 500-501. Particularly where the Board's policy judgment reflects the agency's " 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management," that judgment "is 'subject to limited judicial review.' " *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975). "The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." *Beth Israel*

[16]Deference is owed to decisions of the Board even where the Board's position represents a change from prior policy. *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975) ("To hold that the Board's earlier decisions froze the development of this important aspect of national labor law would misconceive the nature of administrative decisionmaking"), quoted with approval in *Curtin Matheson*, 110 S. Ct. at 1549.

Hosp., 437 U.S. at 501; accord *Curtin Matheson*, 110 S. Ct. at 1549.

Moreover, deference is particularly due the Board's remedial orders. This Court has long recognized that such an order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943). However, the "Board's 'power to order affirmative relief * * * is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices' " and "nothing in the language or structure of the [Act] * * * requires the Board to reflexively order that which a complaining party may regard as 'complete relief' for every unfair labor practice." *Shepard* v. *NLRB*, 459 U.S. 344, 352 (1983).

B. Under These Principles, The Board's Rule Regarding Arbitration Of Post-Contract Expiration Grievances Should Be Upheld

1. This Court has long recognized that the National Labor Relations Act, although not giving the Board authority to remedy all breaches of contract, does vest the Board with power to remedy those breaches that also constitute unfair labor practices. *NLRB* v. *Strong Roofing Co.*, 393 U.S. 357, 360-361 (1969). A breach of contract that repudiates the collective bargaining agreement, in whole or in part, violates Section 8(a)(5) of the Act, where the "renunciation" of the contractual obligation undercuts "the most basic of collective-bargaining principles, the acceptance and implementation of the bargain reached during negotiations." *Nedco Const. Co.*, 206 N.L.R.B. 150, 151 (1973); accord *Sea Bay Manor Home for Adults*, 253 N.L.R.B. 739, 741 (1980), enforced, 685 F.2d 425 (2d Cir. 1982). For that reason, the wholesale repudiation of a con-

tractual agreement to arbitrate grievances constitutes a violation of Section 8(a)(5). See, *e.g.*, *Paramount Potato Chip Co.*, 252 N.L.R.B. 794, 796-797 (1980); *Independent Stave Co.*, 233 N.L.R.B. 1202, 1204 (1977), enforced in pertinent part, 591 F.2d 443, 446-448 (8th Cir.), cert. denied, 444 U.S. 829 (1979); see also note 4, *supra*.

In *Nolde*, this Court held that "termination of a collective-bargaining agreement [does not] automatically extinguish[ ] a party's duty to arbitrate grievances arising under the contract," 430 U.S. at 251, and thus concluded that "where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication," *id.* at 255. As the Board explained in *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 59-60, in view of *Nolde*'s strong presumption that the contractual obligation to arbitrate grievances arising under the contract extends to post-expiration disputes,[17] a blanket refusal to arbitrate post-expiration grievances would violate Section 8(a)(5) and (1) of the Act, absent strong evidence that the parties intended to exclude such disputes from arbitration. Accord *United Chrome Prods., Inc.*, 288 N.L.R.B. 1176 (1988); *Uppco, Inc.*, 288 N.L.R.B. 937 (1988).

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[17] Although *Nolde* involved an action arising under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, the Board has properly looked to that decision for guidance in applying the analogous principles governing collective bargaining under the National Labor Relations Act. Compare *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 374 (1974) ("No obligation to arbitrate a labor dispute arises solely by operation of the [LMRA]. The law compels a party to submit his grievance to arbitration only if he has contracted to do so.") with *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 107-109 (1970) (under the NLRA, the Board may not compel agreement on any contract term, even as a remedy for a proven violation of the Act); cf. *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 256 (1974).

That aspect of the Board's rule regarding the duty to arbitrate post-contract expiration grievances is unexceptionable. As the Board held in *Hilton-Davis Chem. Co.*, 185 N.L.R.B. at 242, and reaffirmed in *Indiana & Michigan Elec. Co.*, "the Act does not impose a duty to adhere to the arbitration procedure independent of any contractual commitment to do so," 284 N.L.R.B. at 58.[18] On the other hand, it is appropriate for the Board to foster the "strong presumption favoring arbitrability" in order to effectuate the federal labor policy favoring arbitration, and the Board is well aware that employers and unions "draft[ ] * * * arbitration clause[s] against a backdrop of [that] well-established * * * policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective-bargaining agreements." *Nolde*, 430 U.S. at 254. The Board therefore has properly embraced the *Nolde* presumption in the context of construing the Section 8(a)(5) duty to bargain. At the same time, the Board has also ensured that such a duty—as applied to arbitration of post-contract expiration grievances—remains grounded on the parties' intentions; the Board has therefore provided that a party may rebut the presumption by an adequate showing that the parties intended to exclude post-contract expiration grievances from arbitration.

2. Similar considerations account for the limited reach of the Board's rule regarding the duty to arbitrate particular post-contract expiration grievances. Under the express terms of the Act, the duty to bargain "does not compel

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[18] For that reason, the doctrine set forth in *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962)—that an employer must maintain the status quo with respect to mandatory subjects of bargaining and refrain from unilateral changes until bargaining to impasse—does not render an employer's failure to arbitrate post-expiration contractual disputes a violation of Section 8(a)(5). See pp. 3-4, *supra*.

either party to agree to a proposal or require the making of a concession." 29 U.S.C. 158(d). And this Court has long recognized that the Board may not compel agreement on any contract term, even as a remedy for a proven violation of the Act. *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 107-109 (1970). It follows that the Board, in fashioning the scope of the post-expiration duty to arbitrate grievances, must use as a touchstone the collective bargaining agreement itself. In other words, the Board's authority to order arbitration is limited to those grievances that *arise under* the expired contract, so that the parties may properly be presumed to have agreed to arbitrate them.

In *Nolde*, the Court observed that "the parties' failure to exclude from arbitrability contract disputes arising after termination * * * affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship." 430 U.S. at 255. However, in order to anchor the implementation of *Nolde* in the source of the duty to arbitrate—the collective bargaining agreement—the Board has rejected the proposition that "the mere invocation of any term of the expired contract triggers the postexpiration duty to arbitrate." *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 60 n.9. The Board, accordingly, has refused to presume—in the absence of contrary evidence—that the parties intend to arbitrate every post-expiration dispute, regardless of subject matter.[19]

[19] Accordingly, the Board has distanced itself from those courts of appeals—like the court below, see Pet. App. A20-A22—that have construed *Nolde* as holding that any post-contract expiration dispute based on the contract is arbitrable, as long as the contract's broad arbitration clause does not explicitly exclude such disputes. See, *e.g.*, *Local Joint Executive Bd., Culinary Workers Union, Local 226* v. *Royal Center, Inc.*, 796 F.2d 1159, 1162-1164 (9th Cir. 1986), cert. denied, 479 U.S. 1033 (1987); *Federated Metals Corp.* v. *United Steelworkers*, 648 F.2d 856, 861 (3d Cir. 1981), cert. denied, 454 U.S. 1031 (1981).

Nonetheless, in citing those decisions, see *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 60, the Board implicitly recognized that each involved a grievance which the Board would likely find arbitrable under the more restrictive approach it follows. In *Royal Center*, the dispute involved alleged violations of a "successorship" clause which, by its nature, could come into play only after the business had been sold and the contract terminated. 796 F.2d at 1163. In *Federated Metals*, the dispute involved eligibility for pension benefits, and turned on whether contractual seniority rights survived expiration of the contract. 648 F.2d at 858, 860.

Rather, the Board has determined that only those post-expiration grievances concerning "contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires" must be arbitrated under the expired contract. *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 60; see *United Food Workers Union, Local 7* v. *Gold Star Sausage Co.*, 897 F.2d 1022, 1024-1026 (10th Cir. 1990); *Chauffeurs Local Union 238* v. *C.R.S.T., Inc.*, 795 F.2d 1400, 1403 (8th Cir.) (en banc), cert. denied, 479 U.S. 1007 (1986). That limitation stems from the Board's striking the balance between two fundamental principles identified in *Nolde*: (1) the principle that "the arbitration duty is a creature of the collective bargaining agreement and [thus] a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so," 430 U.S. at 250-251; and (2) the "well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective bargaining agreements," *id.* at 254.

The Board's rule, "[b]y requiring the dispute to relate back, in some meaningful sense, to the time during which the collective bargaining agreement was in force before

deeming it to arise under that agreement," *Gold Star Sausage,* 897 F.2d at 1026, ensures that the contractual roots of the duty to arbitrate are not abandoned. At the same time, the rule recognizes that the presumption favoring arbitrability appropriately applies only to those disputes covered by the terms of the agreement.[20] Indeed, the Board's approach is a reasonable means of effectuating the parties' original intent—the source of the duty to arbitrate. As one court has explained:

> Usually parties have agreed that certain rights, such as pension, disability, seniority and vacation benefits, can accrue or vest during the life of the contract. The realization of some of these rights may be contingent upon a well-defined future event. An employee should not be deprived of already accrued or vested rights on the fortuity that they became ripe for enjoyment following the expiration of the agreement. Such an employee remains entitled to such rights and to the dispute resolution process the parties agreed to use to enforce them. While the substantive right to continue to accrue benefits terminates with the contract, the right to arbitrate disputes regarding benefits which may have already accrued or vested survives.

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[20] The broader rule—that any post-contract expiration dispute based on the contract is arbitrable, as long as the contract's broad arbitration clause does not explicitly exclude such disputes—has not been deemed by the Board to strike an appropriate balance between the labor principles at stake. As the Tenth Circuit has aptly pointed out, that rule

> stresses the policy favoring arbitration at the expense of the policy against forcing arbitration on a party who has not agreed to it. Essentially, it • • • give[s] [a party] an important part of the benefits of a collective bargaining agreement with none of the attendant responsibilities by, in effect, adding an unbargained-for provision to the parties' expired contract.

Gold Star Sausage, 897 F.2d at 1026.

County of Ottawa v. *Jaklinski,* 423 Mich. 1, 23, 377 N.W.2d 668, 677 (1985).

The *Indiana & Michigan* rule reflects the Board's reasonable determination that where a substantive right accrues or vests during the term of the contract, the parties intend that right to survive the expiration of the contract. It is therefore appropriate to presume that the duty to arbitrate a claimed violation of such an accrued right also survives.[21] To hold otherwise would require the Board to assume that the parties intend to preserve the right, yet at the same time eliminate the contractually designated means of enforcing it. On the other hand, where the Board can discern no basis for finding that the parties intend the substantive right at issue to survive the contract's expiration, the Board may reasonably decline to presume that the parties intend to arbitrate that sort of grievance. Given the contractual nature of the duty to arbitrate, the Board certainly need not presume that any party who ever accepts a broad arbitration clause thereby shows an intent to commit itself to arbitration of all disputes "for all time." *Bell Foundry Co.,* 73 Lab. Arb. 1162, 1166 (1979) (Roberts, Arb.).

In sum, the *Indiana & Michigan* rule reflects the Board's "striking [a] balance to effectuate national labor policy." *NLRB* v. *Truck Drivers,* 353 U.S. at 96. The Board's rule

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[21] Arbitrators have long used a similar approach in determining arbitrability of grievances arising after the expiration of a collective bargaining agreement. See, *e.g., Westwood Products,* 77 Lab. Arb. 396, 397 (1981) (Peterschmidt, Arb.) (post-expiration discharges do not involve accrued rights and therefore are not arbitrable); *Alliance Machine Co.,* 74 Lab. Arb. 1058, 1060-1061 (1981) (Feldman, Arb.) (holiday pay is not accrued, but vacation would be accrued); *The Brooklyn Eagle,* 32 Lab. Arb. 156, 161-163 (1959) (Wirtz, Arb.) (to survive expiration and be arbitrable, rights must be "earned" during the contract's term).

furthers the use of arbitration as a means of resolving labor-management disputes, but at the same time seeks to ensure that resort to arbitration over particular disputes ultimately depends on the parties' mutual consent, as reflected in the collective bargaining agreement. In view of the fact that the National Labor Relations Act itself calls for such an accommodation of often competing principles, the Board's rule is plainly "rational and consistent with the Act." *Curtin Matheson,* 110 S. Ct. at 1549 (citing *Fall River Dyeing,* 482 U.S. at 42).

C. The Union's Post-Contract Expiration Grievances Were Not Arbitrable Since They Did Not "Arise Under" The Contract

Under the Board's established doctrine, see pp. 3-4, *supra,* petitioner's blanket refusal here to arbitrate the union's post-contract expiration grievances violated Section 8(a)(5) and (1) of the Act.[22] But that violation, as the

[22] Although the Board had no occasion to address the issue, see Pet. App. B9 n.6, the court of appeals correctly concluded that the fact that the layoffs occurred almost one year after the contract expired did not, in itself, relieve petitioner of any contractual duty to arbitrate. *Id.* at A16 n.8. *Nolde* established no specific time limit beyond which post-expiration grievances are no longer presumed arbitrable. Indeed, imposition of such a limitation here would enable a party in petitioner's position to profit from its own wrongdoing, since the record here shows that petitioner's unlawful refusal to bargain with the union accounted for the lack of a new collective bargaining agreement. See note 10, *supra*. See, *e.g., Auto Workers* v. *Young Radiator Co.*, 904 F.2d 9, 10 (7th Cir. 1990); *Steelworkers* v. *Fort Pitt Steel Casting Division—Conval-Penn, Inc.*, 635 F.2d 1071, 1078 (3d Cir. 1980), cert. denied, 451 U.S. 985 (1981); but see *Teamsters Local 703* v. *Kennicott Bros. Co.*, 771 F.2d 300, 303 (7th Cir. 1985).

Moreover, petitioner was not relieved of its contractual duty to arbitrate any post-expiration grievances by virtue of the fact that the contract's general no-strike clause was limited to the "term of [the] Agreement." J.A. 34. First, the relevance here of that general clause is

Board determined, did not warrant relief in the form of compulsory arbitration. Under the governing rule set forth in *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 60, those layoff grievances were not arbitrable since they did not "arise under" the contract. The court of appeals therefore erred in declining to uphold that aspect of the Board's remedial order.

First, as the Board found, petitioner decided to convert to "hot-type" operations—the decision that triggered the layoffs—in July 1980, some nine months after the contract expired. Pet. App. B3, B16. Moreover, a substantial factor in that decision was petitioner's loss of 30 percent of a major customer's business, an event that also took place at that time. See J.A. 108-109. The layoffs thus not only occurred after the contract expired, but also were based entirely on events occurring after that expiration.

Second, as the Board determined, the contractual right asserted by the union in the layoff grievances is not " 'a right worked for or accumulated over time.' " Pet. App. B16 (quoting *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 60). Nor did the Board find any evidence that "the parties contemplated that such [a] right[ ] could ripen or remain enforceable even after the contract expired." Pet. App. B16 (quoting *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 60). The contract entitled employees to be laid off on the basis of seniority only "if other things such as aptitude and ability are equal." J.A. 30. Accordingly,

undermined by the contract's separate clause forbidding strikes over arbitrable grievances. See *id.* at 34-35. Second, even absent that specific provision, the Board has held that the no-strike obligation tracks the duty to arbitrate, and therefore continues with respect to those post-expiration disputes that remain arbitrable under *Nolde*. See *Goya Foods, Inc.*, 238 N.L.R.B. 1465, 1467 (1978). Third, a similar contention appears to have been implicitly rejected by this Court in *Nolde*. See 430 U.S. at 257 (Stewart, J., dissenting).

any arbitration proceeding would necessarily entail a comparison between the abilities of laid-off employees and other employees as of the date of the layoffs, *i.e.*, after the contract expired, rather than consideration of events occurring, or conditions existing, during the term of the contract. In these circumstances, the Board correctly determined that the layoff grievances at issue did not involve vested or accrued rights and thus did not "arise under" the expired contract.

Despite the Board's straightforward application in this case of the rule adopted in *Indiana & Michigan Elec. Co.*, the court of appeals declined to uphold the Board's order, since it construed the Board's decision as inconsistent with *Uppco, Inc.*, 288 N.L.R.B. 937 (1988), and *United Chrome Prods., Inc.*, 288 N.L.R.B. 1176 (1988). Pet. App. A19-A20 & n.9. The court of appeals was mistaken.

In *Uppco*, the Board found arbitrable a post-expiration grievance over the failure to recall striking employees on the basis of plantwide seniority. Because the contract required all recalls to be based on seniority—defined as length of service with the employer—and specified five circumstances, not including expiration of the contract, under which seniority would be lost, the Board concluded that seniority rights accrued during the term of the contract and that the parties intended that such rights remain enforceable after the contract expired. 288 N.L.R.B. at 940. In *United Chrome Prods.*, the contract again required recalls to be based solely on seniority and defined seniority in terms similar to those involved in *Uppco*. The Board found that the employees' seniority rights "were worked for and accumulated over time, and * * * thus arguably remained enforceable after the contract expired." 288 N.L.R.B. at 1177. The Board also noted that, after the contract had expired, the employer had locked out its employees and then rehired them as new probationary em-

ployees—conduct which the Board found was an unlawful attempt to deprive them of seniority rights. *Id.* at 1176 n.2. The Board viewed this conduct as a tacit admission that the seniority rights survived the contract's expiration. *Id.* at 1177.

This case is not comparable to *Uppco* and *United Chrome Prods.* Here, the contract by its terms makes aptitude and ability the principal criteria for determining an employee's eligibility for layoff, and requires resort to seniority only "if other things such as aptitude and ability are equal." J.A. 30. As the Board pointed out in *United Chrome Prods.*, aptitude and ability are "subjective factors * * * that remain within the control of an employer." 288 N.L.R.B. at 1177. These are also factors that change constantly. Even if the aptitude and ability of two employees remain equal during the contract term, such levels of skill may sharply diverge at the later date, and in the changed circumstances, when the employer makes its layoff decision. Because of this potential for change, the Board has therefore taken the consistent position that the right to have layoff decisions made principally on the basis of aptitude and ability does not vest or accrue during the term of the contract.[23]

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[23] The court of appeals rejected this harmonizing of the Board's decisions, stating that "[t]his is not a distinction made by the Board, and we do not know whether the Board would impose such a distinction." Pet. App. A20 n.9. In *United Chrome Prods.*, however, the Board explicitly distinguished this case on the ground explained above:

> Unlike the expired contract in *Litton*, * * * the expired contract here provides for recall solely in terms of seniority and does not include more subjective factors such as "aptitude" and "ability" that remain within the control of an employer.

288 N.L.R.B. at 1177. The court of appeals' order remanding the case to the Board for further explanation was therefore unwarranted. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion).

CONCLUSION

The judgment of the court of appeals concerning the Board's order declining to direct arbitration of the grievances should be reversed.

Respectfully submitted.

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QUESTIONS PRESENTED

1. Whether an employer violates § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), by repudiating its contractual obligation to arbitrate grievances otherwise within a contract's arbitration provision, and involving disputes over the proper interpretation and application of that agreement, on the sole basis that disputes first arose and involve facts occurring after the agreement's general expiration date?

2. Whether an employer violates § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 8(a)(5), by unilaterally abandoning grievance arbitration as a term or condition of employment upon the expiration of a collective bargaining agreement without presenting a proposal to the union and bargaining to an impasse on the question? *

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* The union respondent in this Court is Printing Specialties District Council Number 2, the successor to District Council Number 1.

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

A. Facts:

Litton Financial Printing Division ("Litton" or "the employer") operated a check printing plant in Santa Clara County, California. The union represented the production and maintenance employees. In 1974, the union and the employer entered into a collective bargaining agreement which, after a series of amendments and extensions, was in effect until October 3, 1979. J.A. 71.[1]

A decertification election was conducted by the NLRB on August 17, 1979. The union won the election and ultimately a certification was issued in favor of the union on July 2, 1980. J.A. 106-107. After Litton decided to test the certification and refused to bargain with the union, the Board, in a proceeding related to this one, found Litton's failure to bargain to be an unfair labor practice. *Litton Financial Printing*, 256 NLRB 516 (1981). Consequently, Litton was illegally refusing generally to recognize the union during the period when the layoffs and grievances involved in this case occurred (although the employer did offer to bargain solely over the *effects* of the layoff decision here at issue).[2]

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[1] That contract is referred to in this brief as the 1978 Agreement, since the last extension occurred in 1978. J.A. 71.

[2] In addition, Litton's refusal to bargain over the *decision* to lay off the ten individuals was found to be an unfair labor practice by the Board in this case, and the Board's decision in that regard was enforced by the court below. Since this Court denied Litton's petition for writ of certiorari on that issue, the legality of Litton's refusal to bargain over the layoff decision is not before the Court. In short, Litton's assertion that there is "no . . . Board . . . finding that petitioner refused to meet with the union at a reasonable time and confer in good faith" (Brief for Petitioner ("Pet. Br.") at 12-13), is untrue.

This dispute was triggered when ten out of forty-two employees were laid off within a four day period in late August and early September, 1980. Of the top ten employees on the seniority list (J.A. 66-67), seven employees were laid off. The union immediately filed separate grievances on behalf of each laid-off employee.

Each of the layoff grievances (G.C. Ex. 4; *see also* J.A. 63-64) asserted a violation of the "layoff" provision of the 1978 Agreement which stated:

> It is also understood that in case of layoffs, length of continuous service will be the determining factor if other things such as aptitude and ability are equal. J.A. 30.

Section 21 of the 1978 Agreement subjected to resolution through the grievance procedure any "[d]ifference[s] that may arise between the parties hereto regarding this Agreement and any alleged violations of this Agreement, and the construction to be placed in any clause or clauses of the Agreement . . ." J.A. 34.

At the time of the layoffs, Litton continued to maintain a seniority list (J.A. 66-67 and 93), and paid the employees vacation pay and severance pay in direct relation to the length of their service, (J.A. 68-69). Throughout this litigation, Litton has contended that the layoffs did comply with the standards for layoff contained in the expired collective bargaining agreement, while the union has maintained otherwise. J.A. 96. Despite this difference concerning the meaning of the 1978 Agreement as applied to a post-1979 layoff, Litton refused to submit the layoff grievances to the grievance procedure at all, and therefore refused to arbitrate the validity of the layoffs. The basis for Litton's refusal was the broad assertion that because the 1978 Agreement had expired, the grievance arbitration provision was entirely void.

B. Proceedings Below:

The NLRB General Counsel issued a complaint against Litton on November 24, 1980, alleging, *inter alia*, that

Litton had engaged in an unfair labor practice within the meaning of NLRA §§ 8(a) (1) and (5), 29 U.S.C. §§ 158(a) (1) and (5), by refusing "to process the grievances." J.A. 15. The Administrative Law Judge ("ALJ"), on September 4, 1981, found, applying principles enunciated in the NLRB's decision in *American Sink Top Co.*, 242 NLRB 408 (1979), that Litton had indeed violated §§ 8(a) (1) and (5) by refusing to process the grievances, including by declining to arbitrate those grievances. J.A. 114-118.

Litton filed exceptions to the ALJ's recommended decision on this issue. Six years later, the Board reversed the ALJ's decision in part and affirmed in part.

Applying standards the NLRB had set out in *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987), the Board held, *first*, that Litton "violated Section 8(a) (5) and (1) of the Act by refusing to process the layoff grievances [at all] pursuant to the grievance-arbitration clause in the expired collective-bargaining agreement" (Pet. App. B5); *second*, that Litton also violated §§ 8(a) (5) and (1) by repudiating *any* contractual obligation to arbitrate after the contract's termination date (Pet. App. B 1); but *third*, that Litton had no obligation to arbitrate the layoff grievances themselves, because "the right invoked by the grievances does not 'arise under' the expired contract under *Nolde* [*Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977).]" Pet. App. B 16.

In explaining this latter conclusion, the Board looked not at the grievances themselves, or at the union's contentions regarding the applicability of the expired contract in pressing those grievances but, instead, directly at the layoff provisions:

> The right to layoff by seniority if other factors such as ability and experience are equal is not a "right worked for or accumulated over time." *Indiana & Michigan Electric, supra*, . . . And as in *Indiana &*

> *Michigan Electric*, there is no indication here that "the parties contemplated that such rights could ripen or remain enforceable even after the contract expired." *Id.* [Pet. App. B16.]

The union filed a petition for review of the arbitration aspect of the Board's opinion. In support of its petition the union argued, first, that the entire approach of the Board to post-contract arbitration as spelled out in *Indiana & Michigan* is in error, because, contrary to the Board's holding in that case, arbitration provisions, like other terms and conditions of employment, should remain in effect as a matter of statute unless and until the employer bargains to impasse as to changing or abandoning arbitration. In addition, the union took the position that on the Board's more narrow, contractual approach, the Board's conclusion could not be squared with this Court's opinion in *Nolde, supra.*

The Court of Appeals granted the union's petition on the second, narrower ground, and remanded the case to the Board, expressly noting that "[in this appeal, the union has launched a broad-based attack on the fundamentals of the Board's *Indiana & Michigan* decision[,] . . . contend[ing] that an employer who unilaterally abandons a pre-existing arbitration procedure during the post-expiration or hiatus period is guilty of a refusal to bargain under *NLRB v. Katz*, 369 U.S. 736 (1962)." The Ninth Circuit, however, declined to reach this broad contention. Instead, the Court of Appeals concluded that even on the Board's own, contract-based approach, the Board erred.

Specifically, the Ninth Circuit rejected the Board's "accruing or vesting" standards as "[not] consistent with . . . *Nolde*." Instead, the Court of Appeals held that a presumption of arbitrability under an otherwise terminated agreement arises with regard to disputes that develop concerning events after the agreement has expired as long as " 'the dispute is *over a provision of the expired agreement*' " and " 'hinges on the interpretation

ultimately given the contract clause.' " Pet. App. A21, (emphasis in original), *quoting Nolde*, 430 U.S. at 255, 249. In addition, the Court of Appeals regarded the Board's decisions on the question whether its "accruing or vesting" standard covers seniority disputes as inconsistent. Pet. App. A19-20, 22.

This Court granted Litton's Petition For Writ of Certiorari on November 13, 1990, limited to the arbitrability question decided below.

SUMMARY OF ARGUMENT

The NLRB erred in determining that the layoff grievances were not arbitrable under the 1978 Agreement for two independent reasons.

I. First, the Board's standard for determining the arbitrability of posttermination grievances—whether the rights relied upon "accrue" or "vest" during the term of the agreement—is *flatly inconsistent* with the principles governing arbitrability under labor contracts generally, and with the arbitrability standard governing posttermination grievances particularly articulated in *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977). Ordinarily, grievances that claim the violation of some provision of a collective bargaining agreement are arbitrable, without more; as this Court has explained, as long as that requirement is met, the parties are entitled to the arbitration they have bargained for, even if a claim lacks merit, or appears frivolous. Moreover, because of the national labor policy favoring arbitration as a method for resolving industrial disputes, arbitration clauses should be construed to cover particular grievances if at all possible.

Nolde simply applied these principles to grievances that arise after an agreement has expired and concern facts also arising after contract termination. Relying on several earlier decisions of this Court recognizing that the parties to a collective agreement may intend some aspects

of the contract to retain force after its general expiration date, *Nolde* recognized a presumption governing contract interpretation, which the parties can negate "expressly or by clear implication", that an arbitration clause in an expired agreement applies after the agreement's termination as long as the dispute is "over a provision of the expired agreement." 430 U.S. at 255.

As the NLRB has conceded, its limiting gloss on *Nolde*, denying arbitrability to some grievances such as the one in this case that do raise contractual issues concerning the applicability of the expired contract to posttermination events, conflicts with the "arising under" language used in *Nolde*. Moreover, that acknowledged conflict is more than mere semantics: The Board's more limited approach makes the arbitrability of posttermination contractual disputes depend upon the merits of the parties' contentions about whether or not the particular provision relied upon survives the contract's termination date, as this case illustrates. And the net effect of the Board's approach is not to solve the contractual issues the moving party seeks to raise, but to move the dispute either to the courts or to a contest of economic power. Because this result squarely conflicts with the principles for interpreting labor contracts in light of the national labor policy favoring the peaceful determination of contract-based disputes, and because the courts—not the Board—have the principal responsibility for declaring the rules governing the construction of labor contracts, the Board's "accrued" or "vested" limitation on *Nolde* should be disapproved.

Finally, while the foregoing should be dispositive on the *Nolde* question, the Court of Appeals was also correct in remanding to the Board because of inconsistencies in the Board's own cases applying *Nolde*.

II. Alternatively, the NLRB should be reversed because, contrary to current Board doctrine, arbitration systems properly come within the general doctrine that

employers may not unilaterally alter terms and conditions of employment before, during or after the effective dates of a collective bargaining agreement, absent a contractual waiver of the right to bargain or a bargaining impasse.

The unilateral change doctrine, first fully explained in *NLRB v. Katz*, 369 U.S. 736 (1962), seeks to preserve the integrity and vitality of the collective bargaining process by requiring employers to maintain established terms and conditions of employment until the obligation to bargain is fully satisfied. Heretofore, only three kinds of mandatory subjects of bargaining have been excluded from the employer's status quo obligation, each because of strong and direct evidence in the NLRA that the term must expire with the underlying agreement.

None of the reasons the Board gives for creating an additional exception to the *Katz* doctrine for arbitration systems (but not for the grievance mechanism leading up to arbitration) has merit. While arbitration clauses are, under the NLRA's legislative history and this Court's cases, are, of course, contract-based, arbitration is no *more* contract-based than any other term or condition of employment, including wages, hours, and benefits. As to *all* terms and conditions of employment, the NLRA eschews imposing requirements on the parties in the first instance, but only leads them to the bargaining table to decide all such waivers for themselves. The *Katz* doctrine is not in any tension with this principle; rather, under that doctrine, the parties determine their own employment conditions in the first instance, but, precisely to preserve the integrity of the bargaining process, cannot *change* those conditions outside the bargaining process.

Moreover, the Act does not provide employers with the unlimited right to bargain, and to engage in economic warfare, concerning the continuation of mandatory terms and conditions of employment into the post contract period. Therefore, requiring the employer to arbitrate about

such matters does not compromise any statutory right, nor unfairly disadvantage the employer.

ARGUMENT

Throughout this case, the union has relied upon two separate, alternative legal theories, each deriving from long-established lines of authority under § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5):

We argued first that the employer impermissibly repudiated the arbitration clause of the 1978 collective bargaining agreement. Since the seniority grievance the union filed alleged a violation of that agreement, we maintained that the arbitration clause of the agreement applies under *Nolde Bros. Inc. Inc. v. Local 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977) (even though, upon arbitration, the arbitrator could decide *on the merits* that the grievants had no right to seniority-based lay-offs because the seniority provisions had expired).

As to this contract repudiation approach, the NLRB agreed that a § 8(a)(5) remedy would be appropriate if, indeed, the union did have a contract-based right to arbitrate the grievance in question. Pet. App. B7-B8, B15-B16; *see also Indiana & Michigan Electric Co.*, 284 NLRB 53, 59 (1987); Brief for the National Labor Relations Board as Respondent Supporting Petitioner ("NLRB Br."), at 4 n.4, 17-18. The Board determined, however, based on its reading of *Nolde's* teachings on the application of labor arbitration provisions after the general termination date of a collective bargaining agreement, that there was in fact no contract repudiation.

It was on this point that the Court of Appeals reversed the Board, holding that there is no basis under this Court's cases for a refusal to *arbitrate* the contention that a particular labor contract provision has continuing impact after the general expiration date of the contract. As the Court of Appeals recognized, since the dispute is incontestably one about the meaning and effect of that contract, the arbitration provision should apply; the question whether the seniority clause in fact continues to provide employees with any rights after the contract's expiration date is a separate issue, concerning the merits of the dispute, not its arbitrability. Because the Board's approach to the application of *Nolde* conflates the arbitrability issue and the merits of the issue sought to be arbitrated, that approach is squarely contrary to this Court's cases, and should be disapproved.

Second, we maintained that even if the union had no *contractual* right to insist upon arbitration of the seniority grievance, the employer nonetheless violated § 8(a)(5) by unilaterally abandoning the arbitration system as a term of employment. This theory, drawing upon the long-established principle that employers may not unilaterally change terms and conditions of employment once a collective bargaining representative has been chosen without first fulfilling the statutory duty to bargain with that representative concerning the proposed change, was also rejected by the NLRB on the basis of its earlier opinion in *Indiana & Michigan Electric Co., supra*. Although the union continued to press that theory in the Court of Appeals, that court had no occasion to address its validity, because of its acceptance of the contract-based approach just outlined. Pet. App. A17-A18.

We address these two contentions in turn, stressing that each is independently sufficient, if the Court accepts the union's position, to support affirmance of the judgment below.

I. THE PRESUMPTION OF ARBITRABILITY EXTENDS TO ANY DISPUTE CONCERNING THE INTERPRETATION OR APPLICATION OF A COLLECTIVE BARGAINING AGREEMENT CONTAINING AN ARBITRATION CLAUSE, REGARDLESS WHEN THE DISPUTE OR THE FACTS UNDERLYING IT ARISE.

We have no quarrel with the basic parameters of the Board's contract repudiation theory as outlined in its brief to this Court. NLRB Br. at 17-18. Under that § 8(a)(5) doctrine, to the extent that there is a contract-based obligation to arbitrate grievances after the termination date of a collective bargaining agreement, an employer violates its duty to bargain in good faith by categorically renouncing that obligation. *Id.*[3] This aspect

[3] As the Court of Appeals expressly noted, in that court the employer as well accepted the Board's basic § 8(a)(5) contract repudiation doctrine as explicated with regard to the post-termination date arbitration obligation in *Indiana & Michigan*, and debated only the application of that doctrine to the particular facts and contract language in this case. Pet. Ap. A16 n.8. Specifically, Litton questioned the Board's result under the contract repudiation prong of *Indiana & Michigan* only on the basis of its arguments that (1) there was sufficiently clear evidence in the contract that the parties' intended the arbitration provision to lapse entirely on the expiration date of the contract; and (2) the relatively long passage of time between the contract termination date and the filing of the layoff grievances should itself negate any finding that the expired contract contemplated arbitration of those grievances. *Id.*

In this Court, however, the employer appears fundamentally to question the Board's rule that an employer who flatly refuses in a wholesale manner to accept as binding, and to implement, the agreement reached by the parties violates the obligation to bargain in good faith, no matter when that repudiation occurs, and also seeks the square overruling of this Court's opinion in *Nolde*. Pet. Br. 12-14, 15-17. Because Litton's broad-ranging contentions, fundamentally calling into question both long-established Board doctrine and a decision of this Court never questioned in any of this Court's cases, were not raised in the Court of Appeals (or, for that matter in the Petition for a Writ of Certiorari), this Court should not entertain those contentions. *Youakim v. Miller*, 425 U.S. 231, 233-34 (1976); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); *Town*

of the case turns, then, upon a determination as to the proper construction of a contractual obligation to arbitrate as applied to grievances claiming that some aspect of that agreement applies to acts occurring after the general termination date of the contract.

In this case, for example, the grievances concerned layoffs that were implemented months after the agreement's stated termination date. Those grievances were, however, based on the provisions of the agreement establishing seniority as an important criteria in making layoff decisions. J.A. 30. This contractual claim could be sound, or it could be unsound. *See* pp. 22-24 & n.14, *infra*. Either way, however, the *dispute* is one that is covered by the arbitration clause of the 1978 agreement as a "[d]ifference . . . between the parties regarding this Agreement and any alleged violations of this Agreement, and the construction to be placed on any clause or clauses of the Agreement . . ." (J.A. 34), and should therefore be arbitrable.

A. *General Principles Governing Arbitrability*: As a general matter, this Court's approach to determining the arbitrability of labor disputes has turned upon two basic propositions established in the *Steelworkers' Trilogy* cases in 1960. *First*, because "[a]rbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement," and "[t]he processing of even frivolous claims may have therapeutic values of which those who are rot part of plant environment may be quite unaware," arbitration pursuant to a collective bargaining agreement should be

of Hallie v. City of Eau Claire, 471 U.S. 34, 42 n.5 (1985). In the discussion that follows, however, we do respond briefly to some of the arguments Litton makes regarding the basic parameters of the contract repudiation prong of *Indiana & Michigan*, particularly those intended to cast doubt upon the vitality of *Nolde*. *See* pp. 17-19, *infra*.

required without regard to the merits of the grieving parties' contract-based claim:

> The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. . . . The question is not whether in the mind of the court there is equity in the claim. . . [Rather] [t]he function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for. [*United Steelworkers v. American Manufacturing Co.*, 363 U.S. 563, 567, 568 (1960).]

See also United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 585 (1960) ("the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator."); *AT & T Technologies v. Communications Workers of America*, 475 U.S. 643, 649-50 (1986) ("Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator.")

Second, again because of the unique role played by the arbitration of disputes in the labor relations system, in construing the reach of a collective bargaining agreement's arbitration clause, there is a strong presumption in favor of the arbitrability of disputes between the contracting parties:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. [*Warrior & Gulf*, 363 U.S. at 582-83.] [4]

This presumption has particular force where the arbitration clause, like the one in this case, covers all disputes, without exception, concerning the interpretation or application of the collective bargaining agreement:

> In such cases, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." [*AT & T Technologies*, 475 U.S. at 650, *quoting Warrior & Gulf*, 363 U.S. at 584-85.]

B. *Arbitrability of Post-Contract Disputes*: An unbroken line of this Court's cases applying these principles to disputes that in some respect concern events occurring after the general termination date of a collective bargaining agreement confirm that where the *dispute* is over the provisions of a particular collective bargaining agreement, and is one otherwise within the terms of the contractual arbitration provision, there is the usual strong (albeit rebuttable) presumption that the arbi-

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[4] As the Court explained in *Warrior & Gulf*, *supra*:

> The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. . . . Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators . . . Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. [363 U.S. at 580-81.]

tration provisions in that agreement *do* apply to that dispute, regardless of the merits of the union's contractual claim. This presumption pertains no matter when the dispute arises, when the events underlying the dispute occurred, or whether rights are claimed with respect to a period of time after the agreement's general termination date.

The first case in this Court in which a question arose concerning an arbitrator's authority to determine questions reaching beyond the stated general termination clause of a labor agreement was *United Steelworkers v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960), one of the *Steelworkers' Trilogy*. *Enterprise Wheel* concerns the question whether an arbitrator has jurisdiction to award back pay covering a time period after the stated termination date of the collective bargaining agreement under which arbitration was invoked. The Court held that, as long as there is nothing to show "that the arbitrator did not premise his award on his construction of the contract" (*id.* at 598), the arbitrator has authority to construe the effect of the agreement during a post-termination time period.[5]

Four years later, this Court was faced with a situation in which a union "framed the [arbitration] issues to claim rights . . . after the agreement expired by its terms." *John Wiley & Sons v. Livingston*, 376 U.S. 543, 554 (1964). The Court judged that arbitrability claim

[5] *Enterprise Wheel* involved the question of the enforceability of an arbitrator's award after it is issued rather than whether the employer has an obligation to arbitrate a particular dispute in the first place. For present purposes, however, the distinction is immaterial. As *Enterprise Wheel* itself makes clear, the principle that courts must defer to the decisions of labor arbitrators as long as the arbitrator's award "draws its essence from the collective bargaining agreement" (*id.*, 363 U.S. at 597) is based on the same premise as the rule that in deciding arbitrability in the first place, the merits of the dispute are immaterial: In either case, "the question of interpretation of the collective bargaining agreement is a question for the arbitrator," (*id.* at 599).

by the standards applicable to all other contractual disputes:

> We see no reason why parties could not, if they so chose, agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired.
>
> * * * *
>
> Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts . . . *See* [*Warrior & Gulf*,] 363 U.S. at 582-83. [*Wiley*, 376 U.S. at 555.]

Wiley thus confirmed the two fundamental premises which are critical for this case: first, that parties to a collective bargaining contract *may* agree that rights established during the term of agreement are to be realized after the contract expires; and second, that the question whether the parties have in fact so agreed with respect to any particular situation is *a merits issue for the arbitrator*, not an issue governing the arbitrability of the dispute in the first instance.

Most recently in *Nolde*, a case involving the arbitrability under an expired agreement of a union's claim that severance pay was due and owing after the contract had expired, this court reaffirmed the lessons of its earlier cases.[6] *Nolde* noted first that the arguments of the parties in that case demonstrated that "both the Union's claim for severance pay and Nolde's refusal to pay the same are based on their differing perceptions of a provision of the expired collective-bargaining agreement,"

[6] The *Nolde* Court (430 U.S. at 252) noted that in *Piano Workers v. Kimball Co.*, 379 U.S. 357 (1964), the Court in a brief *per curiam* applied *Wiley* to a situation in which, unlike *Wiley*, the union first sought to arbitrate a grievance concerning the post-expiration effect of a collective bargaining agreement after the agreement expired, thereby implicitly deciding the precise issue presented to the Court in *Nolde*. It is worth noting for present purposes that on the merits, the dispute in *Piano Workers v. Kimball Co.* involved a seniority dispute. *See* 333 F.2d 761 (7th Cir. 1964).

with regard to whether a substantive claim for severance pay could survive the collective bargaining agreement. 430 U.S. at 249. Because "whatever the outcome, the resolution of that claim hinges on the interpretation ultimately given the contract clause providing for severance pay," *Nolde* characterized the dispute as one which "although arising *after* the expiration of the collective bargaining contract, clearly arises *under* that contract." *Id.* And, in determining whether this dispute concerning contract interpretation should be referred to arbitration, the Court deliberately refused to entangle itself in the merits of the parties' contractual claims, stressing that "[o]f course, in determining the arbitrability of the dispute, the merits of the underlying claim for severance pay are not before us." *Id.*

Instead, the *Nolde* Court—recognizing that the "severance-pay dispute . . . would have been subject to resolution under those procedures [the grievance-arbitration machine] had it arisen during the contract's term," (*id.* at 252)—held that the arbitrability of post-termination contract disputes, like the arbitrability of pretermination disputes, turns strictly on the proper construction of the *arbitration* clause of the contract alone. And, in construing that clause, *Nolde* held the presumption of arbitrability does not "necessarily expire with the collective bargaining agreement that brought it into existence." *Id.* at 250.[7] Instead, the ordinary presumption of arbitrability applies, even "where the dispute is over a provision of the expired agreement," unless that presumption is "negated expressly or by clear implication." *Id.* at 255.[8]

In light of the arguments raised by petitioner, by its *amicus curiae*, and by the Board in this case for limiting or abandoning *Nolde* (*see* n.3, *supra*; NLRB Br. at 22-23), two related aspects of this Court's opinion there bear particular emphasis. First, *Nolde* is a case about how arbitration clauses in collective bargaining agreements are to be *interpreted* as a matter of the federal common law of collective bargaining agreements. The opinion states an interpretive *presumption* as to the parties' actual intent regarding post-contract arbitration, basing that presumption upon both the national labor policy favoring arbitration of industrial disputes and upon the Court's perception of what parties to a collective bargaining agreement arbitration clause most likely contemplate, absent a clear indication to the contrary.[9] Noth-

[7] *Nolde* explained that the reason for continuing the presumption of arbitrability concerning contract interpretation questions into the post-termination period is that "[b]y their contract the parties clearly expressed their preference for an arbitral rather than a judicial interpretation of their obligations under the collective-bargaining agreement" and "the termination of the collective-bargaining agreement . . . would have little impact upon many of the considerations behind their decision to resolve their contractual differences through arbitration." *Id.* at 254. In particular, the Court noted such considerations as "confidence in the arbitration process," "an arbitrator's presumed special confidence in matters concerning bargaining agreements" and the parties' "interest in obtaining a prompt and inexpensive resultation of their disputes by any expert tribunal"—"do[] not terminate with the contract." *Id.* at 254.

[8] There are, in fact, contracts which do expressly provide that grievances arising after the contract has expired are not arbitrable. *See, e.g., S & W Motor Lines, Inc.*, 236 NLRB 938, 949-950 (1978); *McKesson Drug Co.*, 291 NLRB No. 117 (1988); *General Warehousemen and Employees Union Local No. 636 v. J.C. Penney Co.*, 484 F. Supp. 130, 132 n.1 (W.D. Wisc. 1980). The language relied upon in these cases to determine that post contract disputes are not arbitrable was the kind of "express exclusion or other forceful evidence," *AT&T Technologies*, 475 U.S. at 652, which renders disputes nonarbitrable.

[9] *Nolde* is consistent with a broad range of cases in this Court applying the presumption favoring arbitrability under collective bargaining agreements despite a contention that in the particular circumstances, the presumpton should not apply. *See, e.g., Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974) (presumption of arbitrability applies to safety dispute, despite union's contention to the contrary); *Operating Engineers v. Flair Builders, Inc.*, 406

ing in *Nolde* makes any grievance arbitrable as a matter of law, or seeks to override the parties' clearly expressed intent to the contrary.[10]

Second, for that very reason, it is *not* true that it would "shock[] most unions" (Pet. Br. at 16) to recog-

U.S. 487 (1972) (laches cannot serve as a bar to arbitrability, because "the company is obliged to submit its laches defense even if 'extrinsic,' to the arbitrable process" (*id.* at 492)); *John Wiley & Sons*, 376 U.S. at 556-559 (questions concerning "procedural" arbitrability are arbitrable); *Drake Bakery v. Local 50 Confectionery Workers*, 370 U.S. 254 (1962) (an employer must arbitrate its damage claim against the union despite the contention that the union's conduct repudiated the grievance and arbitration procedure); and *Carey v. Westinghouse*, 375 U.S. 261 (1964) (jurisdictional grievance arbitrable even though only one union party to the jurisdictional dispute would participate in and be bound by the arbitration award).

Moreover, courts have held that questions concerning whether a collective bargaining agreement remains in effect or has been terminated are arbitrable, providing that the arbitration clause is broad enough. See, *e.g. Rochdale Village, Inc. v. Public Service Employees Union Local No. 80*, 605 F.2d 1290 (2d Cir. 1979); *Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 v. Interstate Distributor Company*, 832 F.2d 509 (9th Cir. 1987). The NLRB agrees that questions of contract termination are ordinarily to be resolved through the grievance procedure. *See Refrigeration Design Contractors*, 278 NLRB 122 (1986). Since questions such as the one in this case really concern whether a particular provision of a contract has entirely terminated or remains in effect for certain purposes, no reason appears why that dispute as well should not be determined by the arbitrator.

[10] Indeed, like the employer in *Nolde* (430 U.S. at 251), Litton accepts the proposition that the arbitration clause of an expired collective bargaining agreement governs where the facts giving rise to the grievance took place before contract expiration (Pet. Br. at 20, 24), and, going further, concedes as well the obligation to arbitrate post-contract "entitlements generally regarded as compensation for services already rendered." (Pet. Br. 23). Thus, in the end Litton's disagreement is only with the reach of the post-contract presumption of arbitration recognized by the Court in *Nolde*, and not with the propriety of creating such a presumption as an aid to contract enforcement at all.

nize an obligation to refrain from striking over post-contract grievances arbitrable under *Nolde Bros.* Any responsibility to refrain from economic pressure over such grievances would itself be a contractual one, not one imposed by law, as the NLRB has expressly recognized in perceiving such a limited post-contract no-strike obligation. *Goya Foods*, 238 NLRB 1465, 1466 (1978).[11]

C. *The Board's "Accrued" or "Vested" Rights Rule*: Despite the Board's acknowledgement that "*Nolde* con-

[11] The Board's opinion in *Goya Foods* appears to be a sensible application of this Court's relevant cases. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) held that where a union *agrees* to submit particular disputes to final and binding arbitration, that commitment is violated if the union strikes concerning that dispute, either instead of arbitrating or in addition to doing so. *Id.* at 106. *Gateway Coal Co. v. United Mine Workers, supra*, in turn, applied the same principle to a safety dispute, holding first that the presumption of arbitrability applies fully to safety disputes (as it does, under *Nolde*, to disputes concerning the post-contract survival of contractual terms); and second that the resulting determination that the union made a *commitment* to arbitrate gives rise, under *Lucas Flour*, to a concommitant contractual commitment not to strike over the arbitrable grievance: "Absent an explicit expression [to the contrary], the agreement to arbitrate and the duty not to strike should be *construed* as having coterminous application." *Gateway Coal*, 414 U.S. at 382 (emphasis supplied); *see also Metropolitan Edison Co. v. NLRB*, 490 U.S. 693, 708 n.12 (1983). As the Board concluded in *Goya Foods*, where "[t]he agreement 'lives' on in the duty to arbitrate . . . so should the duty not to strike live on *to the extent of the duty to arbitrate over issues . . . arising out of the expired agreement.*" 238 NLRB at 1467 (emphasis supplied).

In any event, as the Board notes in its brief, in this case there was, *in addition to the general no-strike clause* contained in the expired collective bargaining agreement, an *express* contractual commitment by the union not to strike over *any* "grievance as to the interpretation or application of the terms of this Agreement." J.A. 34-35; *see* NLRB Br. at 24-25 n.22. Given that express promise, there is no need in this case to read into the agreement to arbitrate a no-strike clause that runs coterminously with that commitment. Therefore, this case can be decided without reaching the validity of *Goya Foods*.

tains language with a broader sweep than its narrow holding that a claim to severance pay arguably accruable under the contract is arbitrable . . . after the contract expired" (*Indiana & Michigan*, 284 NLRB at 60), the NLRB nonetheless applied to this case its *Indiana & Michigan* rule limiting the presumption of arbitrability of posttermination events to "contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." *Id.* at 60. The Board's narrow approach to the arbitrability of postcontract disputes has no basis whatever in *Nolde's* language *or* reasoning, and is squarely contrary to the most basic premises of this Court's arbitration cases.

a. The Board's "accrued or vested right" limitation is on its face entirely inconsistent with the governing standard this Court enunciated in *Nolde*—namely, whether the dispute "arises under" the contract (430 U.S. at 249, 253) or "out of the collective bargaining relationship" (*id.* at 255). This Court has consistently used those terms and similar ones to avoid any predetermination of the outcome of the dispute in question, and to assure that the arbitrability inquiry is focussed instead on whether an issue of contractual interpretation or application is involved.

For example, *United Steelworkers v. American Manufacturing Company*, 363 U.S. at 567, explained that "[a]rbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that *arise under* the agreement," (emphasis supplied). At the same time, this Court stressed that in deciding upon arbitrability, the appropriate inquiry is "whether the party seeking arbitration is making a claim which *on its face is governed by the contract.*" *Id.* at 568 (emphasis supplied.) *American Manufacturing* thus used the term "arising under the agreement" to refer to *any* dispute where the party was "making a claim which on its face is governed by the contract." *Id. See also Warrior & Gulf*, 363 *U.S.* at 576 (using the word "arise" broadly in the context of describing an arbitration clause); *John Wiley & Sons*, 376 U.S. at 553-54 (describing a grievance procedure that defined a grievance as a dispute "between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement . . ." as reaching the disputes in that case because those disputes had "arisen between the Union and Interscience. . ." as a result of a change in ownership).

Nolde, in turn specifically *rejected* the proposition that the use of the phrase "arises under" is a term of limitation or exclusion:

> However, even though the parties could have so provided, there is nothing in the arbitration clause that expressly excludes from its operation a dispute which arises under the contract, but which is based in events that occur after its termination.
>
> . . . .
>
> Consequently, the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that *they intended to arbitrate all grievances arising out of the contractual relationship.* [430 U.S. at 252-253 and 255 (emphasis supplied).] [12]

b. The Board's "accrued" or "vested" rights approach is inconsistent with *Nolde* not simply linguistically, but in more fundamental respects as well. For in *Nolde*, the Court emphatically repeated its oft-stated caution *against* turning the arbitrability question into one on "the merits of the underlying claim for severance pay" (430 U.S. at 249; *see also* pp. 15-17, *supra*), and instead made

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[12] *Nolde* referred to "accrued" or "vested" rights only in describing the union's argument on the *merits* of the contractual dispute underlying its grievance in that case. 430 U.S. at 248.

clear that the presumption of arbitrability depends upon whether or not "*whatever the outcome*, the resolution of that claim hinges on the interpretation ultimately given the contract clause," (*id.* at 249).

Under the Board's approach, on the other hand, the Board necessarily "encroaches on the merits of the dispute, an area reserved for the arbitrator." *Indiana & Michigan*, 284 NLRB at 63 (Member Johansen, dissenting). Indeed, the *Indiana & Michigan* Board explicitly acknowledged as much. *Id.* at 60.[13]

The Board's application of its "accruing" or "vesting" limitation in the context of this case vividly illustrates how that standard operates to usurp the function of the arbitrator and to pretermit the arbitration process as a means of determining the merits of the contractual dispute. In the instant case, the Board opined that "there is no indication here that 'the parties contemplated that such rights could ripen or remain enforceable even after the contract expired.'" Pet. App. B 16. In its brief (at 24-27) the Board amplifies that statement, arguing at

[13] In support of the proposition that it is permissible, in "determining arbitrability" to use an "analysis extended beyond [the] arbitration clause to [the] interpretation of the contract right" advanced by the grieving party, the Board relied upon *AT&T Technologies, supra*. *Indiana & Michigan*, 284 NLRB at 60. Nothing in *AT&T Technologies*, supports the proposition that in construing a general arbitration clause, like the one in this case, applying to all contractual interpretation questions, the substance of the particular contractual right relied upon is relevant. To the contrary, *AT&T Technologies* restated in the strongest possible terms, and relied squarely upon, the proposition that in determining arbitrability "a court is *not* to rule on the potential merits of the underlying claims," and instead is to order a contractual claim arbitrated "[w]hether 'arguable' or not, indeed even if it appears to the court to be frivolous." 475 U.S. at 649-50. (emphasis supplied). The fault that the *AT&T Technologies* Court found with the Court of Appeals decision there was that the lower court did not determine arbitrability under the arbtiration clause *at all*, leaving that decision entirely to the arbitrator. *See generally id.* at 652-656 (Brennan, J., concurring).

length that because the layoff clause in this case recognized seniority as relevant only "if other things such as aptitude and ability are equal" (J.A. 30), that clause necessarily entailed a comparison of those "other" factors as of the date of the layoff, and therefore could not have been intended to govern after the contract's expiration date. On this basis, the Board distinguished two other cases, *Uppco, Inc.*, 288 NLRB 937 (1988) and *United Chrome Products*, 288 NLRB 1176 (1988), in which the Board had found that seniority rights *can* sometimes "arise under" the terms of the expired agreement within the limited, meaning the Board attributes to "arise under."

But the finecut contract interpretation question the Board thereby determined—whether or not the right to "layoff by seniority if other factors such as ability and experience are equal" survived the bargaining agreement, as some seniority provisions do or, rather, evaporated entirely once the contract expired because of the nature of the seniority privilege conferred by this particular layoff clause—is, of course, the very question that the union was asking the *arbitrator* to decide.[14]

[14] While, as we stress in the text, the merits of this dispute are not relevant to the arbitrability question, it is worth noting that the union had reasonable arguments to make before the arbitrator, soundly grounded in national labor policy, to support the proposition that the seniority layoff clause should have been read to cover the 1980 layoffs.

This Court has recognized that "[s]eniority has become of overriding importance, and one of its major functions is to determine who gets and keeps an available job." *Humphrey v. Moore*, 375 U.S. 335, 347 (1964). Because employees may, to protect their seniority, forego other opportunities in order to remain in a job, it is generally perceived as fundamentally unfair to divest an employee of accumulated seniority. For that reason, federal labor legislation generally protects seniority rights, even in the face of competing, important rights of other employees. *See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 (1977) (Title VII's protection of seniority, 42 U.S.C. § 2000e-2(h)); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275,

That this substantive posttermination continuity question is not answered in terms in the agreement is immaterial in determining its arbitrability under this Court's

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284 (1946) (veterans returning to their jobs after military service must be granted seniority equivalent to that which they would have had had they remained continuously employed); *Drapery Manufacturing Co., Inc.*, 170 NLRB 1706 (1968) (employer ordered, upon reopening a closed plant, to establish "a preferential hiring list of all employees in the appropriate unit, following the system of seniority, if any, customarily applied to the conduct of Respondent's business."); *Litton Microwave Cooking Products Division, Litton Systems, Inc.*, 283 NLRB 973, 977 (1987); *Laidlaw Corporation*, 171 NLRB 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (reinstated economic strikers entitled to their prestrike seniority even if the contract in effect when they went on strike has terminated); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 230 (1963) ("accumulated seniority of older employees" cannot be divested by granting superseniority to strike replacements).

As these cases reflect, seniority provisions create a form of earned advantage, accumulated over time, that can be understood as a special form of deferred compensation for time already worked. Thus, contractual seniority provisions may sometimes create expectations that continue to be enforceable in the post-contract period. *See Uppco, Inc., supra.* At the same time,

> There are great variations in the use of seniority principles through collective bargaining bearing on . . . the consequences which flow from seniority. All of these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. [*Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521, 526 (1949).]

The layoff language which the union claims the employer violated is a form of modified seniority, because the right of retention is based upon aptitude and ability as well as length of continuous service. F. Elkouri & E. Elkouri, *How Arbitration Works, Fourth Edition* (1985) at 611-13. While the Board insists that the addition of other factors to seniority negates any possibility of continuity into the post-contract period (NLRB Br. at 27), for two reasons the Board is incorrect.

First, many of the "additional factors" are themselves related to an employee's continuity of service in the precontract period, so

cases. One of the strengths of arbitration in the industrial context is that it is a process for filling in "gaps" in the agreement "by reference to the practices of the particular industry and of the various shops covered by the agreement," thereby serving as "the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." *Warrior & Gulf*, 363 U.S. at 580-81. *See also Allis-Chalmers v. Lueck*, 471 U.S. 202, 215 (1985) (courts may not proceed upon "[t]he assumption that the labor contract creates no implied rights").

Nor is it material to the arbitrability question that, on the merits, the union's position, in the Board's view, is

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that any contractually-established rights concerning those factors would also carry forward. For example, "ability" could include such factors as training and length of experience on the job. *See Elkouri & Elkouri*, at 623-625.

Second, the arbitrator would be able to consider, as the Board did not, whether actual practices in the plant gave content to the bare words of the agreement. It could be, for example, that the employer ordinarily relied upon seniority in determining layoffs except when the differences in "other factors" are much greater than even the employer claims to be the case here. In other words, upon adjudication it might have turned out, with respect to some or all of the grievants, that the only *real* difference between the parties concerned whether the employer was entitled to abandon the role seniority usually played in making layoff decisions solely because of the contract's expiration.

In deciding that question, in turn, the arbitrator could consider that Litton *did* maintain the role of seniority in determining terms and conditions of employment after the contract's expiration. *See Nolde*, 430 U.S. at 249, n.5. For example, Litton prepared a new seniority list on August 26, 1980 (J.A. 66-67); paid vacation and severance pay in accordance with seniority as of September 4, 1980; and claimed to be following the contract in the manner in which it laid employees off (J.A. 96). Finally, the contract contained a provision for "baseball" interest arbitration which the arbitrator could conclude had the effect of continuing the contract until the new contract was resolved. (J.A. 53-54.)

incorrect. That is true even if one assumes that the Board has sufficient relevant information, without a full evidentiary hearing on the contract interpretation question, to make this decision. This Court has made it plain time and again that where the parties have contracted for an *arbitrator's* judgment, they are entitled to that judgment, and may derive long term benefit to the collective bargaining relationship *regardless of the outcome of the arbitration process. See, e.g., United Steelworkers v. American Manufacturing Co.*, 363 U.S. at 568; *Carey v. Westinghouse*, 375 U.S. at 272; *see also* pp. 11-12, *supra*.[15]

It is very much to the point in this regard that refusing to order arbitration of a dispute between the parties concerning the impact of a provision of an expired agreement upon posttermination events does not resolve the dispute, but simply moves adjudicative resolution of the dispute to the other available forum, the federal courts. In this case, for example, if the arbitration clause was indeed unavailable, then the affected employees, or the union on their behalf, could have filed a lawsuit in federal court under *Smith v. Evening News Association*, 371 U.S. 195 (1962), concerning their contention that they were laid off in violation of the 1978 agreement. Yet,

[15] Moreover, where, as here, the collective bargaining relationship continued (pursuant to the Board's ruling in a related case, *see* p. 1, *supra*) after the contract itself expired, the parties have an ongoing interest in obtaining the arbitrator's views regarding the meaning and effect of the expired agreement. In negotiating a new agreement, the parties will have to decide whether to seek changes in the previous contract terms; those decisions could well be influenced by an arbitrator's determination, based upon posttermination facts, concerning the effect of those terms in actual situations. Further, to the extent that the same contract language is carried forward into the next agreement in whole or in part, the determination of an arbitrator regarding the effect of that language during contract hiatus periods will itself become part of the "common law of the shop" (*Warrior & Gulf*, 363 U.S. at 582) that arbitration is intended to create.

> By their contract the parties clearly expressed their preference for an arbitral rather than a judicial, interpretation of their obligations under the collective-bargaining agreement. . . . [T]he alternative remedy of a lawsuit is the very remedy the arbitration clause was designed to avoid. [*Nolde*, 430 U.S. at 254.]

Finally, if there were no applicable arbitration clause, there would be no applicable contract-based no-strike clause (*see* n.11, *supra*; *see also* pp. 44-47, *infra*), and the union would have the choice of initiating a judicial proceeding to resolve the dispute or, instead, striking over the dispute (or, conceivably, both). *Cf. Groves v. Ring Screw Works*, —— U.S. ——, 59 U.S.L.W. 4043 (1990). Thus, removing the presumption of arbitrability with respect to a group of contract-based disputes would lead to the possibility of economic warfare over such disputes, "a method [not] of resolving the dispute over the application or meaning of the contract [but] . . . [of] one party impos[ing] its will upon its adversary." *Id.* at 4045. It is because "such a method is the antithesis of the peaceful methods of dispute resolution envisaged by Congress when it passed the Taft-Hartley Act" (*id.*) that this Court has labored to erect the "strong presumption favoring arbitrability," (*Nolde*, 430 U.S. at 254).

In short, as this Court already determined in *Nolde*, as long as the dispute is one which is "based on [the parties] differing perceptions of a provision of the expired collective bargaining agreement" (430 U.S. at 249), the considerations underlying this Court's arbitrability presumptions obtain, (*id.* at 254).[16] Unless those pre-

[16] With respect to Litton's contention that the length of time that elapsed in this case between the expiration of the contract and the layoffs forecloses arbitration, we have only the following to add to the Board's dispositive response (NLRB Br. at 24 n.22) rejecting this argument: The employer has presented no evidence to show how it is prejudiced by any length of time elapsing between the expiration of the contract and the date of the grievance. If there were such an argument to be made, it could be pressed before the arbitrator. *Operating Engineers v. Flair Builders, supra*, 406 U.S.

sumptions are "negated expressly or by clear implication" (*id.* at 255), the Board may not itself negate the presumption depending upon its view of the merits of the contractual dispute.[17]

c. This conclusion is unaffected by considerations concerning the deference often paid by the courts to Board decisions interpreting the National Labor Relations Act. *E.g., NLRB v. Curtin Matheson Scientific, Inc.*, —— U.S. ——, 110 S. Ct. 1542 (1990).

The contract repudiation aspect of this case, as the discussion above indicates, does not turn in any respect at all upon the NLRB's view of those portions of the federal labor statutes ordinarily committed to the Board for resolution in the first instance. Rather, the Board's rationale is based *solely* upon its interpretation of the federal common law governing the interpretation of collective bargaining agreements developed under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Section 301, in turn, "authorizes *federal courts* to fashion a body of federal law for the enforcement of these collective bargaining agreements. . ." *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 451 (1957) (emphasis supplied); *see also Dowd Box Co. v. Courtney*, 368 U.S. 502, 513 (1962) ("Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law . . .'").

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at 490-91 (issues of laches must be raised by an employer as a defense before the arbitrator.)

[17] We note, in addition, that, aside from its conceptual difficulties and the fact that it cannot be squared with *Nolde*, the Board's approach has little to recommend it in terms of creating a workable rule by which the parties can govern themselves. The principle that an arbitration clause ordinarily applies to any grievance invoking a provision of a collective bargaining agreement is one simple to understand and to follow; the distinction between such provisions which do involve "accrued" or "vested" rights and those which do not is likely to require an outside adjudicatory body to determine, as the Board's proffered distinction between this case and other seniority issues it has determined indicates. *See* pp. 30-31, *supra*.

The NLRB, it is true, is entitled to "construe[] a labor agreement to decide [an] unfair labor practice case. . ." *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 428 (1967), and the Board therefore had jurisdiction to do so in this case. But "[a]rbitrators and courts are still the principal sources of contract interpretation." *NLRB v. Strong*, 393 U.S. 357, 360-61 (1969). Because the Board, in determining the contract repudiation aspect of this case, "did not in anyway rely on matters within its special competence. . ." (*Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960)), a court is "fully justified in making its own independent determination of the correct application of the governing principles," (*id.*). *See also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529, n.9 (1984) (refusing to defer to the Board's interpretation of a statute which is "outside its expertise"); *Local Union 1395, IBEW v. NLRB*, 797 F.2d 1027, 1030-31 (D.C. Cir. 1986) (courts should not defer to the Board's views on contract interpretation questions because, *inter alia*, to avoid the risk of conflicting principles regarding the interpretation of contracts, court-developed interpretations should prevail.)[18]

D. *Application of the Board's Standard*: While we believe that the foregoing is dispositive on the contract repudiation issue, the Court of Appeals reversed the NLRB here *both* because the Board applied an erroneous arbitrability standard *and* "[b]ecause of the conflicts within the Board's own cases in applying its test for determining when a post-expiration grievance 'arises under'

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[18] Contrary to the Board's suggestion (NLRB Br. at 17), the Board's refusal to order Litton to arbitrate the grievance dispute was not an exercise of the Board's remedial discretion. NLRB Br. at 17. Rather, as here pertinent, that refusal was based solely on the Board's view on a purely contractual question. There is no reason why the principles discussed in the text negating deference to the Board's views on contract issues should vary depending upon the context in which those issues arise. *See* Pet. App. A 19 (rejection by Court of Appeals of the Board's remedial deference argument).

the CBA so as to give rise to a duty to arbitrate." Pet. App. A 22. In that respect as well, the Court of Appeals was correct, for two reasons.

First, the Board's test for determining whether a matter is arbitrable, as expressed in *Indiana & Michigan*, is whether the grievance "concerns contract rights *capable* of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." 284 NLRB at 60. *See also id.* (whether the grievance is "arguably accruable under the contract. . ."); *United Chrome Products, Inc., supra* (whether the grievance creates *"at least a question* whether the expired contract has conferred on the employees rights that would survive the contract's expiration"). This standard still turns arbitrability on the grievance's merits in a way inconsistent with *Nolde* and its predecessors. Nonetheless, had the standard been properly applied in this case, the Board would have had to determine that the union did raise "at least a question" of continuity of the layoff clause, and that the layoff grievances are arbitrable.[19] Put another way, given the arguments available to the union, a decision favoring the union on the layoff grievance would be one in which the arbitrator is at least "even arguably construing or applying the contract. . ." *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Instead of deciding whether the union made a sufficient showing to "raise a question" on the accrual question, however, the Board answered the question itself. *See* Pet. App. B16.

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[19] The Board uses the words "accruing or vesting." While "vesting" suggests some degree of permanence, "accrue" in the ordinary dictionary definition means "To be added as a matter of periodic gain or advantage, as interest on money." *Random House Dictionary of the English Language*, p. 10. Thus, there is no necessary concept of any permanence to something which "accrues." In a collective bargaining sense, then, it is at least arguable that *any* seniority, whether modified or strict, "accrues" over the time during which the employee works.

Second, the Board in two cases decided after this one held that seniority grievances *can* meet the Board's restrictive standard of arbitrability. In *Uppco, Inc., supra*, the Board stated:

> The contractual definition of seniority makes it plain that, under the parties' agreement, seniority is a benefit that accrued over time during the life of the contract. The contract also specifies the ways by which seniority is lost. Significantly, the contract did not specify that seniority is lost on contract expiration. The contract's failure to specify expiration as one of the ways in which seniority rights could be lost indicates that the parties intended that seniority rights remain enforceable after contract termination. Therefore, the grievance over the Respondent's refusal to recall employees by plant-wide seniority following the strike involves a right worked for and accumulated during the term of the contract and intended by the parties to survive contract expiration. [288 NLRB at 940; *see also United Chrome Products, supra.*]

While *United Chrome*, and the Board's Brief to this Court (at 25-28), attempt to distinguish this case on the basis of differences between the seniority clauses and post-contract practices, nothing in the Board's opinion in this case suggests that either the precise nature of the layoff seniority clause or the employer's post-contract practices (which in fact were *consistent* with postcontract application of seniority (*see* n.14, *supra*)) were in any way relevant to its decision. As rationales not expressed by the Board in its decision, the Board's post hoc explanations cannot cure inadequacies in its initial decisionmaking. *See SEC v. Chenery Corp.*, 333 U.S. 194 (1948).

II. AN EMPLOYER'S OBLIGATION TO ABIDE BY EXISTING TERMS AND CONDITIONS OF EMPLOYMENT UPON THE EXPIRATION OF A COLLECTIVE BARGAINING AGREEMENT APPLIES TO THE OBLIGATION TO ARBITRATE.

A. *The Unilateral Change Doctrine:* In general, a "refusal to negotiate *in fact* as to any subject which is [a mandatory subject of bargaining], and about which the union seeks to negotiate, violates § 8(a)(5), though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end." *NLRB v. Katz*, 369 U.S. 736, 748 (1962) (emphasis in original). Given this broad principle, *Katz* goes on to hold "that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5), for it is a *circumvention of the duty to negotiate* which frustrates the objectives of § 8(a)(5) as much as does a flat refusal." *Id.* (emphasis supplied, footnote omitted).

Five years after *Katz*, this Court confronted a factual variation on the same theme, and confirmed that the unilateral change doctrine also applies where the change occurs *during* the life of a collective bargaining agreement, except to the extent that the contract can be read as a waiver of the employees' § 7 right to bargain collectively as to the particular question. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967). And, most recently, *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539 (1988), reaffirmed the unilateral change doctrine, as applied to a situation, like this one, in which there is an expired collective bargaining agreement:

> Freezing the status quo ante after a collective bargaining agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract. Thus an employer's failure to honor the terms and conditions of an expired collective-bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining in breach of Sections 8(a)(1), 8(a)(5), and 8(d) . . . [Citation omitted] . . . Consequently, any unilateral change by an employer . . . in the expired agreement is an unfair labor practice. [Citations omitted]. [484 U.S. at 544, n.6.]

The statutory obligation to maintain the status quo during negotiations, then, obtains throughout the collective bargaining relationship, because "an employer's unilateral [changes] during the bargaining process tends to subvert the union's position as the representative of the employees in matters of this nature" (*NLRB v. Insurance Agents*, 361 U.S. 477, 485 (1960)), by "showing the employees that it is useless to try to negotiate," (Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1428 (1958)).[20]

Because the purpose of the unilateral change doctrine is to protect the bargaining process, the Labor Board, with the approval of the courts of appeals, has applied the doctrine on the understanding that "generally, provisions of the expired collective-bargaining agreement that relate to mandatory subjects are said to survive the agreement's expiration," save for a "narrow class of exceptional mandatory subjects" excluded because the subject involves "a statutorily guaranteed right [or is] statutorily dependent upon an existing collective-bargaining agreement."

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[20] Because the unilateral change doctrine is grounded in the duty to bargain, the Board recognizes that at some point in negotiations —the point at which impasse is reached—the employer has sufficiently discharged his bargaining duty that the obligation to maintain the status quo no longer obtains. *See Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enf'd sub nom Television Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). The impasse limitation has no possible application here, since the employer did not negotiate at all about altering the arbitration procedure.

Southwestern Steel & Supply, Inc. v. NLRB, 806 F.2d 1111, 1113, 1114 (D.C. Cir. 1986).[21]

For example, the Board and the lower courts have excluded from the unilateral change doctrine union-shop and dues-checkoff arrangements, because, in the Board's view, those employment conditions are permitted by the federal labor statutes only where the condition is expressly codified in a collective bargaining agreement. *See* NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (*four times* conditioning the maintenance of a union security agreement upon an agreement to do so); LMRA § 302(c)(4), 29 U.S.C. § 186(c)(4) (stating that dues checkoff systems are valid only until the "termination date of the applicative collective bargaining agreement"); *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), *aff'd in pertinent part sub nom Shipbuilders v. NLRB*, 320 F.2d 615 (3rd Cir. 1963), *cert. denied* 375 U.S. 984 (1964); *Hudson Chemical Co.*, 258 NLRB 152, 157 (1981). Thus, "an employer's refusal to enforce a union-security [or dues check-off] provision without a contractual basis is 'in accordance with the mandate of the Act.'" *Indiana & Michigan*, 284 NLRB at 55, *quoting Bethlehem Steel.* Similarly,

> a no strike provision does not survive except (in keeping with the strong national policy favoring arbitration, *see* [*Nolde*]), if and to the extent that its correlative arbitration clause survives, *see Goya Foods, Inc.*, 238 NLRB 1465, 1467 (1978). That rule is attributable to the union's statutory right to strike, *see* 29 U.S.C. §§ 158(d)(4), 163; *NLRB v. Lion Oil Co.*, 352 U.S. 282, 293 (1957). A waiver of that right during the life of the collective-bargaining

[21] Because it is rooted not in the contract but in preservation of existing terms and conditions of employment and applies before any contract has been negotiated as well as between agreements, the obligation to maintain the status quo extends beyond the language of the contract to past practices not incorporated in terms in the contract. *The Sacramento Union*, 258 NLRB 1074, 1074-76 (1981).

> agreement is not a "clear and unmistakable" waiver, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708-10 (1983), of the right to strike beyond the contract term. . . . *cf. NLRB v. Lion Oil Co.*, 352 U.S. at 293. . . . [*Southwestern Steel & Supply*, 806 F.2d at 1114.]

On the other hand, the Board has carved out exceptions to the unilateral change doctrine only upon clear and compelling statutory grounds in recognition of the importance of the doctrine in the success of the bargaining process.

For example, the Board has repeatedly held that the obligation to contribute to pension and health and welfare funds continues after contract termination, notwithstanding the contention that 29 U.S.C. § 186(c)(5)(B) mandates a written agreement in order to support such pension or health and welfare contributions. In so doing, the Board views "an expired contract, under which the obligation to make payments to the fringe benefit funds arose, [as] sufficient to meet the 'written agreement' requirement of Section 302(c)(5)(B)." *Concord Metal, Inc.*, 298 NLRB No. 167, slip op. at 3 (1990) (citations omitted). And the Board has maintained that hiring halls established by labor contracts remain effective between contracts, absent impasse on the issue during negotiations. In so doing the Board has rejected the contention that hiring hall clauses should be excluded from the unilateral change doctrine because, although mandatory subjects of bargaining, hiring halls do not directly implicate the employment relationship. *Southwest Security Equipment Corporation*, 262 NLRB 665 (1982), *enf'd*, 736 F.2d 1332, 1337-38 (9th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985); *Southwestern Steel & Supply, Inc.*, 276 NLRB 1569 (1985), *enf'd*, 806 F.2d 1111, 1113-1114 (D.C. Cir. 1986).

B. *Application of Unilateral Change Doctrine to Arbitration*: Arbitration clauses are mandatory subjects of bargaining (*U.S. Gypsum Co.*, 94 NLRB 112 (1951)),

a proposition not questioned in this case. Indeed, it has been convincingly argued that arbitration systems are the single *most* important term of employment, since without a relatively disinterested adjudicatory system, the underlying substantive terms and conditions of employment may as a practical matter prove unenforceable. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L. Rev. 668, 792-99 (1978).[22]

The Board in *Indiana & Michigan Electric*, after following a shifting course on the question for many years, has nonetheless held that arbitration clauses are one of the exceptional provisions excluded from the unilateral change doctrine.[23] The principal reason the Board offered

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[22] Judicial enforcement of the status quo obligation as such would not be available. That obligation is derived not from the contract itself but from the NLRA and is therefore enforceable only through the processes of the NLRB in the first instance. *Advanced Lightweight, supra*, 484 U.S. at 549.

[23] The Board first held that an employer could not repudiate a grievance procedure, including arbitrators, in *Bethlehem Steel, supra*. See also *Kingsport Press*, 165 NLRB 694 (1967), *enforcement denied*, 399 F.2d 660 (6th Cir. 1968).

In *Hilton-Davis Chemical Company*, 185 NLRB 241 (1970), the Board, changing course, held over a dissent that the employer was *not* obligated to respect the arbitration procedure after the contract had expired under any circumstances.

Shortly after this Court decided *Nolde*, the Board reconsidered the question of whether and to what degree arbitration clauses survive contract termination. A unanimous Board in *American Sink Top Co.*, 242 NLRB 1175 (1979) applied *Nolde* broadly to require contract-based arbitration to any grievance whose basis was "arguably" the contract. And, in *Southwest Security Equipment, supra*, 262 NLRB at 665 n.1 and 669-70, the Board concluded that an arbitration clause does survive contract termination under the unilateral change doctrine.

Finally, five years later, in *Indiana & Michigan*, the Board eschewed both *American Sink Top Co.* and *Southwest Security Equipment*, and held (again over dissent) both that *Nolde* is to be applied narrowly and that the *Katz* doctrine does not apply to arbitration clauses (although, said the Board, *Katz* does apply to grievance procedures short of binding arbitration).

for this conclusion is that arbitration clauses, like union security and dues checkoff provisions, "are purely creatures of contract." *Id.*, 284 NLRB at 55, 57-59. As subsidiary reasons, the Board maintained first, that arbitration involves a waiver of a statutory *employer* right to bargain, and therefore cannot be imposed absent such a waiver (*id.*, at 55, relying on *Hilton-Davis Chemical Co., supra*); and second, that there must be symmetry between the treatment of arbitration clauses and of no-strike clauses in the post-contract period, because one is the *quid pro quo* for the other (284 NLRB at 58).

None of these reasons withstands a moment's consideration. At least equally to the point, the Board's reasoning does not take into account the critical consideration that permitting employers to abandon arbitration systems during negotiations will undermine the collective bargaining system in exactly the ways that the unilateral change doctrine is structured to prevent.

a. The Board's primary ground for excluding arbitration arrangements from the unilateral change doctrine—that such clauses are contract-dependent as a matter of federal labor policy—fails because arbitration is no *more* a matter of contract than any other term or condition of employment typically embodied in collective agreements.

(i) As this Court stated emphatically in *H.K. Porter v. NLRB*, 397 U.S. 99, 109 (1970), the premise of the entire statute is to promote "private bargaining under governmental supervision of the procedure alone, *without* any official compulsion over the actual terms of the contract." (Emphasis supplied).

This policy was enunciated by the framers of the original Act in 1935, who stressed that they "wished to dispel any false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms," (S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935)), and was directly embodied in the statute by Congress in 1947, when § 8(d) was added.

That section provides that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." *See also, e.g., NLRB v. Insurance Agents*, 361 U.S. at 497 ("§ 8 (d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements.")

In short, aside from obligations such as those embodied in the minimum wage laws, under our system of collective bargaining *all* terms and conditions of employment are intended ultimately to be the result of agreement between the parties. *No* employer is obligated to pay any particular wages, provide overtime bonuses, permit vacations, abide by any pension or health and welfare plan, or observe limitations on the hours employees work, *unless* the employer has reached agreement with the union to do so.

(ii) Against this background, the *Indiana & Michigan* Board's central basis for treating arbitration clauses specially under the *Katz* analysis must fail unless such clauses are "purely creatures of contract" in some sense *different* from other terms and conditions of employment. But the Board's opinion in *Indiana & Michigan* provides no basis for perceiving such special "ultracontractual" status for arbitration clauses.

First, the Board is unable to point to any language in the statute which remotely suggests that arbitration is dependent upon the existence of an agreement in the same sense as are union security and dues checkoff clauses under the Board's construction of § 8(a)(3) and § 302 (c)(4). Nothing in the NLRA precludes employers generally from instituting arbitration procedures without a collective bargaining agreement, and indeed in recent years many nonunion employers have begun unilaterally to institute grievance procedures culminating in neutral

arbitration.[24] In contrast, a nonunion employer who required an employee to contribute toward, or provided automatic payroll deductions for dues to, a labor organization would violate §§ 8(a)(2) and 8(a)(3) of the Act, or 29 U.S.C. § 186(c)(4).

Nor is the legislative history of the NLRA discussed in *Indiana & Michigan*, 284 NLRB at 57, relevant in this regard. That history shows that in describing the obligation to bargain collectively in good faith, in § 8(d) of the Act, 29 U.S.C. § 158(d), Congress specifically declined to include an obligation to confer in good faith with regard to "*the settlement* of any question arising []under" a collective bargaining agreement, because Congress did not wish to " 'require compulsory arbitration of grievance disputes and other disputes over the interpretation or application of the contract.' " *Id.* 284 NLRB at 57, *quoting* H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947).

This sequence demonstrates only that Congress did not intend to embody in the NLRA, as it had in the Railway Labor Act, 45 U.S.C. § 2, Sixth, a *requirement* that all unions and employers negotiate about and subscribe to binding arbitration. The legislative sequence does *not* address the separate question whether an employer, *having once voluntarily instituted arbitration* as a term or condition of employment in its workplace (either on its own or as a result of negotiations with a union), can then simply declare unilaterally that employees may no longer have the assurance that their substantive terms of employment will be enforceable by a disinterested party. Thus, the Board lacks any legislative materials which supports its position that once arbitration *is* agreed to, the obligation ends with the termination of the agreement.

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[24] *See, e.g.*, Guidry and Huffman, *"Legal and Practical Aspects of Alternative Dispute Resolutions in Non-Union Companies"* 6 The Labor Lawyer 1 (1990).

Similarly, the Board's heavy reliance on the statements in this Court's opinions that "arbitration is a matter of contract" (*Warrior & Gulf, supra*, 363 U.S. at 582; *see also Gateway Coal Co., supra*, 414 U.S. at 374) disregards their context. *Warrior & Gulf*, for example, notes that "a party cannot be required to submit to arbitration any dispute which he has not so agreed to submit" (363 U.S. at 582), in the course of resolving a question concerning the scope of the arbitration clause. But nothing in that opinion, or in any other opinion of this Court, indicates that arbitration clauses are a "matter of contract" in any sense *different* from any other term or condition of employment.

(iii) Thus, arbitration clauses are "matters of contract" under the NLRA only in the *same* sense as are other terms and conditions of employment: Whether or not to provide for arbitration is left to the parties in the first instance, because the statute generally regulates only the bargaining process, and does *not* mandate any of the substantive terms and conditions of employment. And, as this Court has repeatedly recognized, the basic rule that once the parties have agreed on a contract term the employer can not unilaterally change that term during negotiations is supportive of, rather than in tension with, this overall statutory scheme.

The *Katz* doctrine does *not* choose for the parties which terms to institute in the first place. Rather, *Katz* and its progeny concern only *changes* in those terms the employer has already once agreed to as appropriate, whether unilaterally or through bargaining, and seeks to assure, by protecting the integrity of the bargaining process, that those changes will in fact be the result of consensual, bilateral decisionmaking. As to this purpose, arbitration is indistinguishable from any other term and condition of employment to which the parties have agreed, since, *for the future*, the shape of the grievance and arbitration process, if any, is for the parties to determine.

Indeed, it could be argued that, if anything, the unilateral change doctrine should have *greater* force with respect to arbitration provisions, since the inclusion of such clauses in the agreements ultimately negotiated is the *only* kind of term or condition of employment which the statute affirmatively encourages. *See* NLRA § 13(d), 29 U.S.C. § 173(d). Consequently, there is a particular reason under the NLRA to "foster[] a non-coercive atmosphere that is conducive to serious negotiations on a new contract" (*Advanced Lightweight, supra*, 484 U.S. at 544, n.6) with regard to arbitration.[25]

b. As a corollary to its reliance on the contractual nature of an arbitration provision, the *Indiana & Michi-*

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[25] An example might clarify this point: *Katz* would, absent the Board's exception for arbitration clauses, require that if a non-union company had instituted a neutral arbitration system as a term or condition of employment (as employers are increasingly doing precisely as a means of avoiding union organization, *see* n.24, *supra*), that system remain in effect once a union is certified, unless and until the parties either agree otherwise or bargain to impasse on the question. *Cf. Donn Products, Inc.*, 229 NLRB 116, 117 (1977) (unilateral implementation of arbitration for employee grievances violative under *Katz*). Presumably, under *Indiana & Michigan*, however, an employer could abandon the arbitration process upon union certification (unless it could be proven that the employer's purpose in doing so was to frustrate the bargaining process). Although the Board has not expressly so ruled, this result ineluctably follows from established unilateral change principles, which, as we have seen, do not differ in their operation during initial bargaining and during contract hiatus periods.

This result, however, would have precisely the effects that the unilateral change doctrine is designed to avoid: The employer would have refused to negotiate, in fact, about a matter likely to be of major concern to the employees during the period negotiations are ongoing, and could create the coercive impression that choosing union representation decreases rather than improves employment security, thereby undermining the union's strength and cohesiveness at the bargaining table. At the same time, there would be no sense in regarding the arbitration system as purely contractual under those circumstances, since the system was unilaterally instituted by the employer in the first place before the union was certified—just as were the wage rates, hours, and so on.

gan Board also suggested—drawing upon a more complete discussion of this point in *Hilton-Davis Chemical Co.*, *supra*—that the Act confers on employers a *right* to engage in free collective bargaining with regard to the implementation of established terms and conditions of employment, and to use economic power in support of their bargaining position, rather than to entrust binding decisionmaking on such implementation questions to a neutral third party. This "right," the Board indicated, can be surrendered only by voluntary contract, and not otherwise. 284 NLRB at 55-56; *see also Hilton-Davis*, *supra*, 185 NLRB at 242.

The difficulties with this analysis are numerous. For one thing, while the statute does in terms protect the right of *employees* to bargain collectively, NLRA § 7, 29 U.S.C. § 157, there is no parallel provision with respect to employers. And, in fact, the overall structure of the statute does *not* provide the employer with any *right* to bargain collectively with a union; to the contrary, the employer may not impose a union on its employees or require a union that does not wish to do so to represent its employees. *See, e.g., American Sunroof Co.*, 243 NLRB 1128, 1129 (1979).[26] And while there is *explicit* statutory protection for the right to strike (§ 13, 29 U.S.C. § 163), there is none for the employer's right to engage in economic warfare. In short, although the statute does require that *if* a union agrees to represent employees in bargaining, the union must bargain in good faith (NLRA § 8(b)(3), 29 U.S.C. § 158(b)(3)), nothing in that provision confers on the employer an enforceable *statutory* right to negotiate about implementation issues, rather than to abide by the decision of a third party selected mutually by the union and the employer.

[26] In contrast, a union *can* compel an employer to engage in collective bargaining against the employer's will, by invoking the union certification procedures of § 9(a) of the Act, 29 U.S.C. § 159(a). *See Linden Lumber Division v. NLRB*, 419 U.S. 301 (1978).

Moreover, whatever the scope of the protection accorded by the statute to employer bargaining and economic weapons, there is *no* basis for drawing a *different* line in this regard with regard to arbitration and other terms and conditions of employment. The net result of eliminating arbitration as a mechanism for determining disputes regarding deviations from the terms and conditions of employment established by the expired contract during the contract hiatus period is *not*, under the Board's doctrine, to allow such deviations wholesale; the result is to substitute the Board for the arbitrator. *See* n.22, *supra*.

Thus, an employer does *not*, under Board doctrine, have the freedom to interpret and apply the previous agreement according to its own views, or to engage in economic warfare in support of its interpretation, during initial bargaining or contract negotiation periods. Rather, the very doctrine the Board refuses to apply to arbitration provisions—the unilateral change doctrine—constrains the free play of economic forces as to the continuity of established terms of employment.[27]

The Board's approach in this regard, moreover, fails to factor in the statutory *preference* that the parties to a collective bargaining relationship establish and maintain an independent decisionmaking process. *See* pp. 40-41, *supra*. In this instance, for example, the union could have sought to have the Board adjudicate as an unfair labor practice its contention that the layoffs were in contravention of the standards established by the lapsed agreement for making layoff decisions, and thus constituted a unilateral change in these standards. Pet. App. B16, n.9. Instead, the union attempted to have that issue decided by the neutral mechanism the parties themselves had established. To hold the former option is available but not

[27] This is not to say that *any* dispute over the application of standards contained in the expired agreement constitutes a sufficient unilateral change to amount to an unfair labor practice.

the latter creates discontinuities in developing the "common law of the shop" through the system best equipped to do so, and could thereby impair the efficacy of arbitration *after* a new agreement is reached.

c. Finally, *Indiana & Michigan* suggests that carrying an employer's obligation to arbitrate forward into the contract hiatus period would be inherently unfair, because the arbitration agreement is the *quid pro quo* for the union's no-strike pledge, yet the no-strike clause, as the waiver of an explicit statutory right, would not be enforceable during that period. 284 NLRB at 58.

This contention obscures the distinction between two aspects of contractual no-strike commitments: The first, which is inherent in the union's agreement to arbitrate and therefore need not be explicit, is the commitment to submit disputes over the employer's implementation of the contract's terms to final and binding arbitration, rather than to settle such disputes through economic warfare. *Local 174, Teamsters v. Lucas Flour Co., supra.* In addition, however, a no-strike clause, depending upon its precise breadth and specificity, can encompass a commitment not to strike to *change* the basic contract during its term. *See generally* Feller, *A General Theory of the Collective Bargaining Agreement, supra,* 61 Cal. L. Rev. at 753-755 & 792-805.[28] That broad commitment is entirely separate from any agreement to arbitrate. And, this Court's cases indicating that an arbitration clause is usually the *quid pro quo* for a no-strike pledge refer to the obligation not to strike over arbitrable grievances, *not* to any broader no-strike obligation. *E.g., Boys Markets, Inc. v. Retail Clerk's Union,* 398 U.S. 235, 248 (1970); *Gateway Coal,* 414 U.S. at 882.[29]

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[28] In fact, the agreement in this case had two distinct no-strike clauses for each of these separate purposes. *See* n.11, *supra.*

[29] As we understand this Court's opinions, the references to arbitration clauses and no-strike clauses covering arbitrable grievances as the "quid pro quo" for each other were intended in the metaphorical sense: Negotiating parties would ordinarily perceive the two as interdependent, and not agree to one without the other. As a matter of actual give and take at the bargaining table, however, the union may, depending on the circumstances, have not only to forego the right to strike over issues concerning contract application but, as well, lower its wage, hour, benefit, or other demands in order to convince the employer to agree to an arbitration system. In other words, abandoning the arbitration system can fundamentally distort the *total* package of terms and conditions of employment contained in the agreement and carried forward into the contract hiatus period, since the other terms may have been acceptable only in light of the arbitration commitment.

Once this distinction is understood, it becomes clear that the issue regarding the relative rights of the parties to engage in economic warfare raised by application of *Katz* to arbitration clauses is a very narrow one.

Plainly, nothing in the *Katz* doctrine, including continuity of the arbitration commitment, would affect the union's right to strike in support of its bargaining demands for a new contract immediately upon the expiration of the collective bargaining agreement.

There is also no reason, however, why carrying forward the arbitration system for the purposes of determining disputes regarding the *established* terms and conditions of employment would in any way prevent the *employer* from engaging in economic warfare, including, for example, a lockout, in order to enhance its position at the bargaining table. On the other hand, an employer has *no* statutory right to lock out, or engage in other unilateral action, *in support of any unilateral change,* because the substantive unilateral change itself would be an unfair labor practice.

Thus, the symmetry notion comes down to the assertion that if *Katz* applied to arbitration clauses, the employer could not lock out in support of its position in a dispute about whether or not a certain action in fact is inconsistent with the prior contract's norms, but the un-

ion could strike. While, if the Board's position in *Indiana & Michigan* were reversed, it would be for the Agency to determine the consequences of that reversal for the union's right to strike in that circumstance, there is no reason to believe that a solution consistent with the statute, both in preserving the union's statutory right to strike and the overall balance of power between the parties, would not be forthcoming.[30]

For example, where the union actually invokes the arbitration procedure with respect to a particular grievance, the union has, at the least, necessarily agreed to arbitrate that dispute, and "the unique conjunction between arbitration and no-strike" commitments (*Metropolitan Edison Co. v. NLRB*, 460 U.S. at 708, n.12) could then support the conclusion that there is a concommitant commitment not to strike concerning that grievance as well.[31] Moreover, it is possible that the union could be required to express a willingness, for some period of time or for the entire length of the contractual hiatus period, not to strike over arbitrable grievances, before it could success-

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[30] Analoyogus problems remain with respect to the *Indiana & Michigan* Board's conclusion that the grievance procedure short of submission to a neutral decisionmaker *does* survive contract expiration. For example, the Board has not yet, to our knowledge, explained whether a union can strike during the pendency of a grievance procedure invoked under *Indiana & Michigan*. Nor do we know whether it is the "grievance" or the "arbitration" rule of that case that applies to final dispute resolution systems, very common in collective bargaining agreements, that consist not of neutral decisionmakers but of representatives from union and management. *See Teamsters v. Riss and Co.*, 372 U.S. 517 (1963).

[31] This result is particularly likely in this instance, because the parties expressly provided in their contract that the union cannot take economic action over any grievance. *See* n.11, *supra*.

Further, as to many grievances at least, the no-strike commitment of the prior contract would carry forward, because the arbitration agreement would be contractually as well as statutorily based. *See Goya Foods, Inc., supra*.

fully invoke the arbitration clause in the first instance after contract expiration.

d. The upshot of the foregoing analysis is that the Board has given no reasoned explanation for creating an exception to the unilateral change doctrine for arbitration. Moreover, that exception is based upon a misunderstanding of this Court's cases on the nature of the arbitration commitment, and fails to give any weight to the affirmative statutory policy in favor of the inclusion of arbitration provisions in collective bargaining agreements. As such, the *Indiana & Michigan* application of the *Katz* rule to arbitration clauses fails even the deferential standard of review this Court applies to Board statutory decisions.

Board decisions are "judicially reviewable for consistency with the [governing] Act, and for rationality." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978). Moreover, "[d]eference to the Board, 'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.'" *NLRB v. Financial Institution Employees*, 475 U.S. 192 at 202 (1986) (citation omitted). Applying these standards, this Court has refused on a number of recent occasions to defer to the Board's construction of the Act.[32]

In this instance, moreover, theer are two weighty considerations in addition to the Board's failure to satisfy

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[32] *See, e.g.*, in addition to *NLRB v. Financial Institution Employees Association*; *NLRB v. International Longshoremen's Association*, 473 U.S. 61 (1985); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984); *DeBartolo Corp. v. NLRB*, 463 U.S. 147 (1983); *Florida Gulf Coast Building Trades Council v. NLRB*, 485 U.S. 568 (1988); *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *NLRB v. International Longshoremen's Association*, 447 U.S. 490 (1980); *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and *Detroit Edison Co. v. NLRB*, 440 U.S. 201 (1979).

minimal standards of rationality, that caution against according the usual respect to the Board's views on the unilateral change issue. First, those views were premised upon the Board's erroneous understanding of this Court's cases interpreting collective bargaining agreements. The Board has no particular expertise on contract interpretation questions (*see* pp. 28-29, *supra*), nor any special role in applying this Court's precedents. *See NLRB v. International Longshoremen's Association*, 473 U.S. at 80. Second, in this instance the Board has radically altered its course several times. *See* n.23, *supra*. "[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis beyond that which may be required when an agency does not act in the first instance." *Motor Vehicles Manufacturers Association v. State Farm Mutual*, 463 U.S. 29, 42 (1983).[33] In light of the legal, logical and practical deficiencies of the Board's opinion in *Indiana & Michigan* surveyed above, the Board has not met that heightened standard.

Consequently, should the Court find it necessary to address the question in order to decide this case, the Board's holding that the employer did not violate its obligation to maintain the status quo during negotiations by abandoning the arbitration clause should be disapproved.

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[33] While the Court has approved the use of an "evolutionary" Board approach toward difficult problems of statutory interpretation as a response to "significant developments in industrial life [which were] believed by the Board to have warranted a reappraisal of the question . . ." (*NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975)), what has changed here is not "industrial life" but the Board's views on strictly legal issues.

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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No. 90-285

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LITTON FINANCIAL PRINTING DIVISION,
A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED

On November 13, 1990 this Court entered the following order in the above-entitled case:

> The petition for a writ of certiorari is granted, limited to Question 2 presented by the petition.

Question 2 presented by the petition is as follows:

> When the facts upon which a seniority-related grievance is based occur almost one year after the expiration of the collective bargaining agreement recognizing seniority and requiring arbitration, does Section 8(a)(5) of the National Labor Relations Act require the employer to submit to the arbitration of the grievance?*

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* The Union poses two questions which are not the same as Question 2 in the petition for certiorari.

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LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY BRIEF FOR PETITIONER

STATEMENT OF THE CASE

A. Facts:

In order to dispel any implication petitioner was a "wrongdoer" unlawfully refusing to bargain with the Union during the 11-month period between contract expiration (October 5, 1979) and the grievance events (late August and early September 1980), the following chronology is set forth:

- 7/12/79 An employee files a petition to decertify the union.
- 7/26/79 Company and Union sign a stipulation for an election.
- 8/17/79 Election is held.
- 8/24/79 Company files objections to conduct affecting results of election.
- 9/28/79 Acting Regional Director issues Report on Objections recommending a hearing on certain objections.
- 10/5/79 Contract expires.
- 10/8/79 Company files exceptions to report.
- 1/28/80 Board issues decision and order adopting report and ordering a hearing.
- 3/18/80 Hearing is held.
- 4/3/80 Hearing Officer issues report.
- 4/14/80 Company files exceptions to report.
- 7/2/80 Board issues decision certifying Union.
- 9/30/80 Board issues complaint alleging Company has unlawfully refused to bargain since *August 1, 1980.*
- 6/12/81 Board issues decision finding Company has unlawfully refused to bargain since *August 1, 1980.*

According to the Board's own documents, the Union's representative status was legally in question until July 2, 1980, when it was certified and petitioner did not refuse to bargain until August 1, 1980, so the contract had

expired 10 months before petitioner is even accused of refusing to bargain.[1]

The only way for an employer to obtain Court review of a Board certification is to refuse to bargain with the certified union, which refusal is characterized as a "technical" refusal to bargain. This is not the type of "wrongdoing" which the courts refer to when they prevent a party from "profiting from its own wrongdoing." For a period of about 1 month of the 11-month hiatus, petitioner refused to bargain with the Union as a means of challenging the Board's decision to overrule its objections to conduct affecting the results of the election. That refusal, for a 1-month period, following a period of 10 months when the Union's representative status was legally in question, can hardly be characterized as "wrongdoing." Indeed, during the period July 12, 1979 and July 2, 1980, petitioner could not lawfully have bargained with the Union over the elimination of the obligation to arbitrate post-termination grievances. *Dresser Industries, Inc.*, 264 NLRB 1088 (1982).

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[1] In the representation proceeding, an employee filed a petition to decertify the Union. During the period before the election, Union representatives told employees they would forfeit their pension credits of less than ten years if the Union lost the election. The Union won the election by 1 vote, 28 to 27. The Company filed objections to conduct affecting the results of the election based on these threats. *Litton Financial Printing Division*, 256 NLRB 516 (1981), *Litton Financial Printing Division*, Case No. 32-RD-170. The Court may take judicial notice of the record in Case 32-RD-170. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Zantop Air Transport Corp.*, 394 F.2d 36, 40 (6th Cir. 1968). *United States v. An Undetermined Quantity*, 583 F.2d 942 (7th Cir. 1978).

B. Proceedings Below:

The Union seeks to raise the "unilateral change of working conditions" theory in this case. It should be noted:

1. No complaint allegation was ever made in this case that petitioner had unlawfully unilaterally changed a working condition by refusing to arbitrate.
2. Neither the Board nor the Court below made such a finding.

In its opening brief, in arguing that §§ 8(a)(5) and (d) of the Act do not require the arbitration of post-termination disputes, petitioner stated, "There is no complaint allegation or Board or court finding that petitioner refused to meet with the union at a reasonable time and confer in good faith with respect to wages, hours or conditions of employment, or the negotiation of an agreement or any question arising under an agreement." Brief for Petitioner, p. 12-13. While petitioner's statement is overly broad, inasmuch as the Board and Court ruled against petitioner on the decisional bargaining issue, it is precisely correct with regard to the arbitration issue before this Court.

ARGUMENT

The Union has filed a 49-page brief, with about 28% of its total line space devoted to small-print footnotes. The brief cites 81 reported cases.

This case is not that complicated.

Much of the Union's brief is devoted to pointing out the worthiness of arbitration and the significant role it plays in the collective bargaining system. Its argument

simply does not address the issue before this Court regarding the inapplicability of §8(a)(5). The Union's second argument advances the "unilateral change of working conditions" theory which is not within the question presented in this case and otherwise lacks merit.

A. Congress Did Not Elect To Make The Refusal To Arbitrate A Post-Termination Grievance An Unfair Labor Practice.

Petitioner is not attacking (1) the institution of arbitration, (2) the collective bargaining system, or (3) a union's right to pursue the arbitration of a post-termination dispute by filing a civil action to compel arbitration under §301(a) of the Act. What petitioner does contend is that Congress, in §§ 8(a)(5) and (d) of the Act, did not make it an employer unfair labor practice to refuse to arbitrate a post-termination dispute. It is that simple, but the Union's brief nowhere addresses that issue. Its arguments would be more appropriately addressed to a Court in a §301(a) action to compel an employer to arbitrate a post-termination dispute, but they are totally irrelevant to the issue presented here: Did Congress make it an unfair labor practice to refuse to arbitrate a post-termination dispute?

Arbitration plays a role in the collective bargaining system. Our national policy favors the resolution of disputes arising from *existing* collective bargaining

agreements through arbitration, rather than the courts or by the exercise of economic power. 29 U.S.C. §173(d).[2] But that does not mean that the Board, without congressional authority, can say it is an unfair labor practice to refuse to arbitrate a post-termination dispute.

The world will not come crashing down on the institution of arbitration and the collective bargaining system will not be left in shambles if this Court holds petitioner did not violate §8(a)(5) of the Act by refusing to arbitrate a dispute which arose eleven months after contract expiration. 29 U.S.C. §158(a). Congress has provided §301(a) of the Act as an avenue to compel the arbitration of post-termination disputes where appropriate. 29 U.S.C. §185(a). It simply has not provided an unfair labor practice proceeding as an alternate route.[3]

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[2] Neither the Board nor the Union (nor the courts, for that matter) have faced up to the fact Congress referred to "existing" collective bargaining agreements in stating the preference for arbitration.

[3] Nor will the courts be flooded with litigation and American industry be shut down by strikes should the Court decide to modify or restrict the *Nolde* theory. The overwhelming majority of arbitrations occur while the collective bargaining agreement is still in effect. Disputes based on pretermination events are admittedly arbitrable in a post-termination arbitration, as are disputes based on accrued or vested rights. The parties may, if they wish, specifically provide for the arbitration of other post-termination disputes. The relatively few nonarbitrable disputes which are left will not shut down the court system and destroy our economy.

B. The Question Whether It Is A Violation Of §8(a)(5) Of The Act To Refuse To Arbitrate A Post-Termination Dispute Is Properly Before This Court.

The Union contends this issue was not raised in the court below or in the petition for certiorari. Brief of Respondent (Union), p. 10, n. 3. This is a puzzling contention. In its Reply Brief in the court below (p. 1), petitioner specifically argued that ". . . *Nolde Bros. v. Bakery Workers Local 358,* 430 U.S. 243, involved a civil action brought by a union against an employer to compel arbitration under a collective bargaining agreement, pursuant to a specific statute providing for such actions.[1] It did not, as here, involve a finding in an unfair labor practice proceeding that the employer had unlawfully refused to meet with a union at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.[2] " (Footnotes 1 and 2 set forth §§ 301(a) and 8(d) and are omitted here.) In its opinion (Pet. App. A15, n. 7), the court below noted the distinction but ignored it, choosing to rely on *Nolde* to support its decision. In the petition for certiorari (p. 14-15), petitioner argued quite specifically, in support of its argument regarding question 2, that the court below had stretched *Nolde* beyond its limits "for another reason. *Nolde Bros.* involved a suit brought under Section 301(a) . . . [b]ut the instant case involves an allegation Litton violated Section 8(a)(5) of the . . . Act. Section 8(d) of the Act very specifically defines an employer's obligation under Section 8(a)(5). It seems pure fiction to hold that a refusal to arbitrate a dispute based on facts transpiring almost one year after contract expiration is the same

thing as refusing (in the words of Section 8(d)) '. . . to meet at reasonable times and confer in good faith with respect to wages, hours . . . .' "

C. The Union's "Unilateral Change Of Working Conditions" Argument Is Beyond The Scope Of The Question Presented For Review In This Proceeding.

Petitioner filed a timely petition for certiorari presenting the question: When the facts upon which a seniority-related grievance is based occur almost one year after the expiration of the collective bargaining agreement recognizing seniority and requiring arbitration, does Section 8(a)(5) of the National Labor Relations Act require the employer to submit to the arbitration of the grievance? Pet. Cert. (i). This Court's order granting the petition specifically limited the grant to that question. Order, November 13, 1990. In its petition, petitioner argued the court below had stretched *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO,* 430 U.S. 243, beyond its intended limits. Petitioner argued, (1) the language of the CBA clearly negated the *Nolde* presumption of arbitrability, (2) various courts of appeals had issued decisions in conflict over the significance of the passage of time between contract expiration and grievance events, and (3) *Nolde* did not apply to a §8(a)(5) proceeding. Pet. Cert. 10-15. No question was presented regarding the "unilateral change of working conditions" theory.

The Union did not file a cross-petition for writ of certiorari as it had the right to do under Rule 12.3, Rules of the Supreme Court. Rule 10.1, Rules of the Supreme Court, indicates "the character of reasons that will be

considered" by this Court in deciding a petition for a writ of certiorari. The issue which the Union now seeks to bring before this Court in its brief does not appear to fall within the ambit of Rule 10.1(a). The court below noted the Union's *Katz* argument (Pet. App. A16-A17) but "decline[d] the parties' invitation to resolve their dispute over *Indiana & Michigan.*" Pet. App. A18. Thus, in the words of Rule 10.1(a), the court below did not render "a decision in conflict with the decision of another United States court of appeals in the same matter . . . ." It specifically declined to render a decision on the "unilateral change of working conditions theory," so how can its decision be in conflict with the decision of another court of appeals on the same question? Further, in the words of Rule 10.1(c), the court below did not decide "an important question of federal law which has not been, but should be settled by this Court. . . ." It declined to decide the question. Nor, again in the words of Rule 10.1(c), did the court below decide "a federal question in a way that conflicts with the applicable decisions of [the Supreme Court]," for it declined to decide the question. The Union should not be allowed to piggyback on petitioner's petition for certiorari an issue which it could not, and did not even attempt to, raise in a cross-petition for certiorari. In its brief, the Union acknowledges the deficiency in its position. Brief of Respondent (Union), p. 4.

D. The *Katz* Theory Of "Unilateral Change Of Working Conditions" Does Not Apply To The Facts Of This Case.

In *Katz*, the parties were actively engaged in bargaining on a number of mandatory subjects, including sick leave and wages. Proposals and counterproposals with respect to sick leave had been made at three sessions, when the employer, without notifying or consulting with the union, announced changes in its current sick leave plan. The *Katz* Court found a §8(a)(5) violation because such action "would inhibit the useful discussion contemplated by Congress in imposing the specific obligation to bargain collectively." 369 U.S. at 744. Here, there were no active negotiations taking place and thus no discussion to inhibit. It is highly significant petitioner at all times offered to negotiate with the Union over the effects of the layoffs, but the Union requested no such discussion. Pet. App. A6, B4, B5, JA 65. In *Katz*, the employer, during active negotiations, offered one plan for automatic wage increases, then, without advising or consulting with the union, announced an entirely different wage plan. This, of course, implementing a benefit during active negotiations without first offering it to the union, is recognized as garden variety bad-faith bargaining, and the *Katz* Court so found. 369 U.S. at 745. No such issue exists here because negotiations were not in progress or requested. The third unilateral action in *Katz* related to merit increases which the employer implemented without notice to the union, even though the subject of merit increases had been raised at three negotiating sessions. Again, the *Katz* Court found a violation, apparently on the same "it inhibits the useful discussion contemplated by Congress"

theory. 369 U.S. at 746. Here, there were no negotiations taking place in which discussion could possibly be inhibited even though discussion over the effects of the layoffs was available to the Union simply for the asking.

E. The Board Has Properly Excluded Arbitration Provisions In Expired Contracts From The Reach Of *Katz*.

In *Katz*, the Court expressly did "not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action. . . ." 369 U.S. at 748. In *Indiana & Michigan Electric Co.*, the Board reviewed the rather on-again, off-again history of its rules on post-contract termination arbitration and determined to clarify "Board law concerning the postexpiration duty to arbitrate . . . ." 284 NLRB at 54-57. Relying upon legislative history, a recognition that arbitration is voluntary, and is grounded on the mutual consent theory adopted by this Court, the Board reached the conclusion "that the arbitration commitment arises solely from mutual consent and that Congress did not intend the National Labor Relations Act to operate to create a statutory duty to arbitrate." 284 NLRB at 57-58.

In *Indiana & Michigan*, the union "argue[d] that because arbitration is a mandatory subject of bargaining, [the Board is] compelled by the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1961), to conclude that the [employer's] unilateral abandonment of that procedure during the contractual hiatus violated Section 8(a)(5)." 284 NLRB at 58. The Board rejected the argument:

"We do not believe that the Court's general formulation in *Katz* of the requirements imposed by Section 8(a)(5) is applicable to the post-expiration withdrawal from arbitration. To conclude otherwise flies in the face of the specific admonition of the Court and the clear intent of Congress that submission to arbitration is purely a matter of consent and cannot be mandated by operation of the Act. Rather, we find, because an agreement to arbitrate is a product of the parties' mutual consent to relinquish economic weapons, such as strikes or lockouts, otherwise available under the Act to resolve disputes, that the duty to arbitrate is sui generis. It cannot be compared to the terms and conditions of employment routinely perpetuated by the constraints of *Katz*. We believe, therefore, that if a duty to arbitrate arising from such mutual and voluntary consent survives the expiration of the written agreement embodying it, it cannot be solely on the basis of general rules of bargaining developed under the National Labor Relations Act. Our view in this regard is not unprecedented. We have also declined to apply *Katz* to unilateral abandonment of union-security and dues-checkoff provisions following contract expiration because they, like arbitration, are purely creatures of contract. See *Bethlehem Steel Co.*,

136 NLRB 1500, 1502 (1962), affd. in pertinent part sub nom. *Shipbuilders v. NLRB*, 320 F.2d 615 (3d Cir. 1963)." (Footnote omitted). 284 NLRB at 58-59.

In its brief (p. 37), the Union contends "None of these reasons withstands a moment's consideration." This is followed by 12 pages of argument. The Union first attacks *Indiana & Michigan's* reliance on the analogy of arbitration to union-security and dues-checkoff provisions. Section 8(a)(3) of the Act does require "an agreement" to legitimatize a union-security clause. 29 U.S.C. §158(a)(3). However, this Court made it quite clear in *Katz* that its decision did "not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action. . . ." 369 U.S. at 239. The Board's rationale for equating arbitration to union security does not appear to be so seriously flawed that it can be said to be unreasonable, *i.e.*, exceeding the bounds of reason or moderation. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495. There is no real distinction between contractual consent based upon a statutory requirement (union security) and mutual assent based upon decades of Supreme Court case law (arbitration). To hold otherwise is to exalt form over substance. The proper reply to the Union's contention consent to union security is required by statute while mutual assent to arbitration is only required by Supreme Court case law is, "So what!"

The Union, citing §302(c)(4) of the Act, 29 U.S.C. §186(c)(4), argues dues checkoff is only operable, by statute, when there is a written agreement to have dues checkoff. Therefore, says the Union, the Board's analogy between arbitration and dues checkoff is not a valid one. Aside from the fact there is no significant

distinction in requiring consent by reason of Supreme Court case law rather than statute, §302(c)(4), literally read, does not require a written agreement between the *employer and union* authorizing checkoff. What the section does require is that the employer have "a written assignment" *from the employee*. There is nothing in the section requiring a written contract between the employer and union authorizing dues checkoff, so the Board does have a precedent recognizing the unilateral abandonment of a working condition which does not, by statute, require an agreement between employer and union.

In any event, there is a substantial nexus between a statute and the Board's decision not to apply *Katz* to the duty to arbitrate. Section 13 of the Act, 29 U.S.C. §163, provides that "[n]othing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." Those are strong words. Presumably, when Congress adopted the phrase "nothing in this Act," it meant to include §8(a)(5). But if an employer must arbitrate a dispute under an expired agreement, in order to avoid a §8(a)(5) violation under *Katz*, the union cannot strike over that dispute. But §13 says that "nothing in this Act" (including §8(a)(5), presumably) can be construed so as either to interfere with, impede or diminish *in any way* the right to strike. There is, then, a statutory basis for not applying *Katz* in this case.

The Union argues *Indiana & Michigan* is flawed because all terms and conditions are the result of mutual assent, not just the arbitration obligation. But just because all terms and conditions of employment (including arbitration) are based on mutual assent does not mean

they cannot be treated differently if a rationale exists for doing so. The Board appears to have supplied that rationale. Arbitration is the only term of employment pursuant to which the employer relinquishes its right to use economic weapons and a union's statutorily-protected right to strike might be eliminated. On the very face of it, an agreement to submit disputes of unlimited magnitude to a third party for resolution is not in the same category as a contractual provision providing for a 10-minute break period.

F. The Union Cannot Be Allowed To Strike Over Post-Termination Disputes Concerning Which The Employer Must Arbitrate.

If an employer is compelled by §8(a)(5) to arbitrate a post-termination dispute, the union cannot strike over that dispute, the arbitration and no-strike clauses being the "quid pro quo" for each other. 29 U.S.C. §158(a). This result undermines §13 of the Act, which provides that "nothing" in the Act is to be construed to interfere with, impede or diminish in any way the right to strike. 29 U.S.C. §163. It is not a sufficient answer to say the union waives its right to strike when its seeks to arbitrate a post-termination dispute because it may be the employer who is seeking the arbitration of a post-termination dispute. Clearly, the employer cannot waive for the union its right to strike. Nor should the union be given the option to (1) arbitrate by seeking to arbitrate a post-termination grievance or (2) strike by striking and relying on §13 of the Act and the strict rules regarding waiver.

It cannot be successfully argued in this case that the Union waived its right to strike in Section 21A of the

collective bargaining agreement (JA 34-35), as the Union and Board both contend. Brief of Respondent (Union), p. 19, n. 11. Brief for the National Labor Relations Board, pp. 24-25, n. 22. This argument was accepted by the court below, which characterized Section 21 as "a rather unusual provision [which] contains its own 'no-strike clause'. . . ." Pet. App. A4, n.1.

The Union, Board and court below misread Section 21A. It is not sufficient to pick out one part of Section 21 and dwell on that part in isolation. Sections 20 and 21 must be read in conjunction with one another and their various parts harmonized. JA 34-35. It is Section 20 which is the "no-strike" clause. It is entitled "Strikes-Lockouts." It expressly provides ". . . there shall be no strikes, boycotts, sitdowns, stoppages of work or any other form of interference with production or other operations on the part of the employees *during the term of this Agreement.*" (Emphasis added.) On the other hand, Section 21A is entitled "Grievance Procedure" and never mentions the word "strike." It never mentions the word "union." What it does mention is "employee" and "suspension or interruption of work." What it does provide is that an *employee* with a grievance shall not *suspend or interrupt* his (or her) work but shall promptly file a grievance. The Union's assertion that Section 21A constitutes "an express contractual commitment by the *union* not to *strike* over any 'grievance as to the interpretation or application of the terms of this Agreement' " is inaccurate. Brief of Respondent (Union), p. 19, n. 11. In fact, Section 21A is nothing more than a "cooperation" clause commonly contained in grievance procedures. According to a study of 1,717 major agreements conducted by the United States Department of Labor, virtually all (99%) included a grievance procedure and "[a] pledge by union and

management to utilize the contract grievance procedure machinery often prefaced the grievance provision of the contract. The pledge often included a general statement banning work stoppages during the processing of a grievance. . . ." The Department of Labor study goes on to provide several examples of a "Union-Management Cooperation in Grievance Handling" clause, including the following clause which is quite similar to Section 21A:

> "Should any differences arise between the Company and the union as to the meaning and application of the provision of this agreement . . . there shall not be a suspension of work on account of such differences, but an earnest effort shall be made to settle them promptly . . . ." *Major Collective Bargaining Agreements, Grievance Procedures*, United States Department of Labor, Bulletin No. 1425, pp. 14-15.

The purpose of Section 21A is to insure that an *employee* with a grievance files it promptly and returns to work, and that the parties attempt to resolve it quickly, whereas Section 20 is a pure no-strike clause prohibiting *strikes* by the *Union*. By its express terms, Section 20 expires when the agreement expires.

It is axiomatic that the Board or a court not ignore clear-cut contractual language. Hardly any language could be more clear-cut than Section 20. It is also a rule of contract construction that the various parts of a contract be interpreted so as to give meaning and effect to all parts. If Section 21A is a "no-strike" clause, as the Union contends, the clear-cut language of Section 20 is meaningless. If Section 21A is viewed as a

"cooperation" clause, which it is, and Section 20 a "no-strike" clause, which it is, meaning and effect can be given to both clauses. Thus, the contention the Union traded away its statutory right to strike after the contract expired in Section 21A in return for an arbitration clause is without merit because it specifically limited its pledge not to strike "to the term of this Agreement" in Section 20. This conclusion is consistent with the long-standing principle that a union will not be found to have waived a right absent "clear and unmistakable evidence of a waiver." *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708. The Board would never hold that Section 21A, standing alone, amounted to a "clear and unmistakable" waiver of the right to strike, especially when the provision is immediately preceded in the contract by a clearly written provision limiting its promise not to strike to "the term of this Agreement." *Universal Security Instruments,* 250 NLRB 661, 662 (1980), *enfd. in relevant part,* 649 F.2d 247, 256 (4th Cir. 1981).

CONCLUSION

A reversal of the decision of the court below is the only result which (1) keeps faith with the long-standing precedent that arbitration is a matter of mutual consent, (2) gives credence to a policy favoring the *voluntary* arbitration of disputes arising from *existing* contracts, (3) does not undermine the right to strike guaranteed by §13 of the Act, (4) recognizes the strict waiver rules regarding waiving the right to strike, (5) is consistent with the mandate of §8(d) of the Act that the parties, not the government, decide what goes into a collective bargaining agreement, (6) will not spawn litigation over what rights "arise under" a contract or how much time is reasonable, (7) will provide certainty in a confused area

of law, and (8) reconciles and gives meaning to *all* of the contract language *agreed upon by the parties* in this case, including the introductory clause ("the stipulations set forth below shall be in effect for the time hereinafter specified"), Section 20, Section 21A and the termination clause.

A reversal of the decision of the court below will not bring on the Armageddon in labor-management relations projected by the Union. Nor is there any factual basis for the Union's assertion unions lower demands to convince employers to agree to arbitration. It is just as likely employers agree to increased union demands in order to convince unions to agree to arbitration. We do not know.

Katz is not properly before the Court and is not applicable in any event. In framing the *question* it was deciding and in stating its *holding,* the *Katz* Court made it clear the case was limited to a situation where an employer unilaterally instituted a change in a working condition during active contract negotiations. 369 U.S. at 737, 743, 747. No active contract negotiations were taking place in this case.

Section 8 of the Act prohibits certain conduct by both employers and unions as "unfair labor practices." 29 U.S.C. §158. Both are prohibited from "refus[ing] to bargain." Not coincidentally, this is the only unfair labor practice where Congress has precisely defined what is required to avoid a violation. 29 U.S.C. §158(d). No mention is made of arbitrating post-termination disputes. Furthermore, Congress has provided a specific remedy for the breach of a collective bargaining agreement; either party may sue the other in a district court to seek to compel the arbitration provided for in the collective bargaining agreement. 29 U.S.C. §185(a). In the face of this, the thrust of much of the Union's brief is

that this Court ought to find a violation of §8(a)(5) of the Act by affording it a broad interpretation because of the general policy favoring arbitration. A similar argument was made and rejected by Justice Stevens (writing for the eight participating Justices) in *Laborers Trust Fund v. Advanced Concrete*, 484 U.S. 539 at 551:

> "Our principal reason for rejecting these arguments is our conviction that Congress' intent is so plain that policy arguments of this kind must be addressed to the body that has the authority to amend the legislation, rather than one whose authority is limited to interpreting it."

Dated: February 21, 1991.

Respectfully submitted,

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(10)

No. 90-285

In the Supreme Court of the United States

OCTOBER TERM, 1990

LITTON FINANCIAL PRINTING DIVISION,
A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS RESPONDENT SUPPORTING PETITIONER

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This case involves the validity and application of the National Labor Relations Board's rule regarding the duty of employers and representatives of employees to arbitrate grievances under expired collective bargaining agreements. That rule, set forth in *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. 53 (1987), provides that an employer is required to arbitrate only those post-expiration grievances "arising under" the expired contract, *i.e.*, disputes concerning "contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." *id.* at 60.

Here, the Board concluded that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by unilaterally repudiating the arbitration provisions of the expired contract with respondent union. Under the *Indiana & Michigan* rule, however, the Board determined that the union's post-expiration grievances about petitioner's layoff of employees were not arbitrable under the contract.

In a broadside attack on the Board's *Indiana & Michigan* rule, the union contends that petitioner has a contractual obligation to arbitrate the layoff grievances. Moreover, the union argues that the National Labor Relations Act itself obligates petitioner to arbitrate those grievances. Petitioner, on the other hand, agrees with the Board that the grievances were not arbitrable under the *Indiana & Michigan* rule. Petitioner asserts, however, that its refusal to arbitrate post-expiration grievances did not even amount to an unfair labor practice. As we shall show below, the union's arguments and those of petitioner fail to undermine either the validity of the *Indiana & Michigan* rule or the propriety of the Board's application of that rule to the facts of this case. Accordingly, the court of appeals erred in refusing to uphold the Board's order declining to direct arbitration of the union's grievances.

1. The union contends (Br. 19-28) that the Board's *Indiana & Michigan* rule conflates the arbitrability of a grievance with the merits of the particular dispute and thus may not be squared with this Court's decisions in cases such as *Nolde Bros.* v. *Local No. 358, Bakery Workers*, 430 U.S. 243 (1977). The union's position is mistaken on two grounds. First, the union misconceives the Board's role in ordering

arbitration of post-expiration grievances. Second, the union misreads this Court's pertinent arbitration decisions.

a. The Board considers the issue of arbitrability against a background that differs markedly from the circumstances presented to courts adjudicating suits under Section 301 of the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 185. Such Section 301 actions involve claims for specific performance of promises to arbitrate grievances. See, *e.g.*, *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 451 (1957). If the court determines that the reluctant party promised to arbitrate the grievance at issue, the court must order specific performance. See, *e.g.*, *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Indeed, the court may not refuse to order arbitration on the ground that the contractual claim is meritless or unfair. See, *e.g.*, *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568 (1960).

The Board's authority over arbitration clauses in collective bargaining agreements is circumscribed not by the practice under the LMRA, but rather by the fact that the Board exercises such authority only in the course of adjudicating and remedying unfair labor practices. *NLRB* v. *Strong*, 393 U.S. 357, 360-361 (1969). Under the Board's settled practice, a refusal to arbitrate a particular grievance or class of grievances does not automatically violate the National Labor Relations Act, even if the grievance or grievances in question are in fact arbitrable. See NLRB Br. 4-5 n.4. Accordingly, in this case, as in *Indiana & Michigan Elec. Co.*, the question of arbitrability does not relate to the underlying issue of whether an unfair labor practice has occurred. Rather, the arbitrability of the grievances is relevant only to the

Board's selection of an appropriate remedy for the proven unfair labor practice of total repudiation of the arbitration procedure.

Moreover, the Board need not automatically order arbitration as a remedy for the unfair labor practice of repudiating the arbitration procedure. As this Court has made plain, "nothing in the language or structure of the Act * * * requires the Board to reflexively order that which a complaining party may regard as 'complete relief' for every unfair labor practice." *Shepard* v. *NLRB*, 459 U.S. 344, 352 (1983). For example, in *Paramount Potato Chip Co.*, 252 N.L.R.B. 794, 797-798 (1980), the Board entered a cease and desist order to remedy the employer's unlawful general repudiation of the contractual arbitration procedure during the term of the contract; the Board chose not to order arbitration of any specific grievances. For these reasons, the union is mistaken in suggesting that the Board must order arbitration in the face of the sort of unfair labor practice at issue here.

b. This Court's arbitration decisions, like the Board's *Indiana & Michigan* rule, ensure that courts —rather than arbitrators—determine the threshold question whether the parties agreed to arbitrate particular disputes. Contrary to the union's view (see Br. 20-21), the Court's decisions do not support a rule making presumptively arbitrable any dispute over the interpretation or application of a provision of an expired collective bargaining agreement.

In *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643 (1986), for example, a dispute arose over whether a layoff of certain employees violated the provision of the collective bargaining agreement (Article 20) prescribing the order in

which employees would be laid off because of lack of work. The union claimed that the layoff violated Article 20 because there was no lack of work; the union thus sought to compel arbitration under Article 8, which provided for arbitration of differences arising over interpretation of the agreement. The company countered that the grievances were not arbitrable under the Article 9 exemption for "certain management functions." 475 U.S. at 645. The court of appeals upheld the district court's decision ordering arbitration. The court reasoned that, since a determination of arbitrability would require it to interpret two substantive provisions of the contract, deciding the arbitrability issue would also impermissibly require the court to consider the merits of the dispute. *Id.* at 647-648.

This Court reversed. The Court reaffirmed the principle "that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." 475 U.S. at 649. Nonetheless, the Court emphasized that "[u]nless the parties clearly and unmistakably provided otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Ibid.*; see *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. at 582-583; *International Union of Operating Engineers, Local 150* v. *Flair Builders, Inc.*, 406 U.S. 487, 491 (1972). Indeed, the Court recognized that this rule "follows inexorably" from the rule that a party cannot be required to arbitrate absent a prior agreement to do so. *AT&T Technologies*, 475 U.S. at 649. "With these principles in mind," the Court concluded, "it is evident that the [court of appeals] erred in ordering the parties to

arbitrate the arbitrability question." *Id.* at 651. The Court determined that the court of appeals had failed to perform its duty "to interpret the agreement and to determine whether the parties intended to arbitrate grivances concerning layoffs predicated on a 'lack of work' determination by the [employer]." *Ibid.*[1]

In *AT&T Technologies*, the Court thus recognized two principal points which support the Board's *Indiana & Michigan* rule. First, there is not always a bright line between the issue of arbitrability and the merits of the underlying dispute. Second, the possibility of some overlap between the two—which exists where arbitrability cannot be determined without interpreting substantive contract provisions—does not relieve the reviewing authority of its obligation to decide the issue of arbitrability.

This Court's decision in *Nolde Bros.* v. *Local No. 358, Bakery Workers*, 430 U.S. 243 (1977), is fully consistent with *AT&T Technologies*. In *Nolde*, the Court recognized that it had a threshold obligation to determine whether the parties had agreed to arbitrate grievances arising after expiration of the contract. 430 U.S. at 250-251. The Court was able to make that determination, however, without interpreting any substantive provision of the contract. The employer had staked out the position that, since the duty to arbitrate is contractual, the duty necessarily

[1] The union asserts that, in *AT&T Technologies*, the court of appeals erred in failing to "determine arbitrability under the arbitration clause *at all*." Br. 22 n.13 (emphasis in original). As this Court explained, however, the lower court erred in failing to interpret the substantive provisions of the contract that were relevant to a determination of whether the parties intended to exclude the subject matter of the grievance from the coverage of the arbitration clause. *AT&T Technologies*, 475 U.S. at 651.

terminated with the expiration of the contract. The Court rejected that contention, noting that the arbitration clause did not expressly exclude post-expiration disputes, that there were strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract, and that the severance pay dispute at issue would have been subject to resolution under the arbitration procedure had it arisen during the contract's term. See *id.* at 249-250, 252-253.

In other words, given the context of the case—the employer's broad contention and the union's severance pay claim involving "accrued" or "vested" rights earned by employees during the term of the contract but payable only upon termination of employment, 430 U.S. at 248—the Court in *Nolde* had no occasion to determine whether the parties intended to arbitrate other kinds of post-expiration disputes.

c. The Board's *Indiana & Michigan* rule requires arbitration of only those post-expiration grievances concerning "contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 60. That rule is a test for determining the arbitrability of the grievance, rather than its merit, and thus is fully consistent with the principles articulated in the Court's decisions discussed above. Accordingly, the Board does not examine an expired contract to determine whether a particular grievance is meritorious. The Board examines the expired contract only to determine whether there is a sufficient nexus between the subject matter of the grievance and the contract to justify a conclusion that the parties intended to arbitrate the grievance despite the expiration of the contract.

That is precisely what the Board did in this case. The Board did not determine whether the contested layoffs out of seniority violated the contract. Rather, the Board considered the relevant terms of the contract, *i.e.*, requiring that layoffs be made on the basis of seniority only if other factors such as aptitude and ability were equal, merely to determine whether the nature of the right asserted was such that it could reasonably be assumed—in the absence of any affirmative evidence as to the parties' intent—that they intended this right to remain enforceable after the contract expired.

As we have shown (NLRB Br. 27), the Board reasonably concluded that, regardless of the merits of the particular grievances, the right asserted—which would depend on a comparison of the aptitude and ability of employees after the contract expired—was not the kind of right that presumptively survives the contract's expiration. Accordingly, the Board reasonably determined that the grievances, although invoking a provision of the expired contract, did not "arise under" the contract. For that reason, the Board concluded that there was no basis for ordering arbitration.[2]

2. The union further contends (Br. 32-48) that, even if it had no *contractual* right to insist upon arbitration of the layoff grievances, it had a *legal* right to such a remedy. In so contending, the union invokes the principle established in *NLRB* v. *Katz*, 369 U.S.

[2] As we have explained (NLRB Br. 26-27), the court of appeals was mistaken in its conclusion that the Board's application of the *Indiana & Michigan* rule here was inconsistent with previous Board decisions. See *Uppco, Inc.*, 288 N.L.R.B. 937 (1988); *United Chrome Prods., Inc.*, 288 N.L.R.B. 1176 (1988).

736 (1962), namely, that an employer must maintain the status quo with respect to mandatory subjects of bargaining and refrain from unilateral changes until bargaining to impasse.[3] The Board, however, has reasonably determined to treat arbitration agreements as outside the framework of the unilateral change doctrine.

a. The union asserts (Br. 38) that, since all terms of employment other than those imposed by law are the product of consensual agreement, there is no basis for the Board's distinguishing the commitment to arbitrate on that ground.[4] The employer's obligation not to make unilateral changes in terms of employment after expiration of a collective agreement is part of "the general rule that an employer must bargain about changes in terms and conditions of employment regardless of how those terms came to be initially established." *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 55. Indeed, the union acknowledges

[3] The union raised this argument before the court of appeals, but the court had no occasion to consider it. See Pet. App. A16-A18; NLRB Br. 13 n.15. In these cirmumstances, the union may properly raise this issue before the Court. See, *e.g.*, *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984); *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

[4] The union ignores the fact that proposals concerning most terms of employment that are mandatory subjects of bargaining may be implemented by the employer after bargaining to impasse with the union. This is not true, however, of a no-strike clause, which involves a waiver of the union's statutory right to strike. See, *e.g.*, *Colorado-Ute Elec. Ass'n*, 295 N.L.R.B. No. 67 (June 15, 1989). Since an agreement to arbitrate is the *quid pro quo* for a no-strike commitment (see pp. 13-15, *infra*), the Board could reasonably conclude that it, too, cannot be put into effect—or continued—except by mutual consent.

that the statutory obligation to maintain existing terms of employment "is not rooted in the contract," and applies to past practices as well as contract terms. Br. 34 n.21.

Accordingly, it is generally no defense to a post-contractual unilateral change that the employer no longer *consents* to maintain a particular contractual term. The gravamen of the Section 8(a)(5) violation is not that the employer has abrogated a contractual term, but that it has changed a term of employment without first bargaining with the union. The obligation to maintain the existing terms arises by operation of the Act in order to protect the bargaining process. See *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988). The obligation does not at all stem from the employer's agreement to maintain the terms in its collective agreement.

b. However, the Board has not applied that general rule inflexibly. See NLRB Br. 4. To do so, the Board has recognized, would undermine the policies and purposes of the Act. In *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 57-58, the Board explained that requiring an employer to adhere to a contractual commitment to arbitrate after contract expiration would violate the congressional mandate that the Act not require compulsory arbitration as a method of settling questions arising under collective agreements. The Board pertinently noted that the version of Section 8(d) passed by the Senate provided that "to bargain collectively is the performance of the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or *the settlement of* any question arising thereunder." 1 NLRB, *Legislative*

History of the Labor-Management Relations Act, 1947, at 242 (1985) (emphasis added). The underscored language was deleted in conference:

> [T]he Conference agreement omits from the Senate amendment words that were contained therein which might have been construed to require compulsory settlement of grievance disputes and other disputes over the interpretation or application of the contract.

H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35 (1947).

The Board therefore based its decision to treat an expired contractual commitment to arbitrate differently from other expired contractual terms—for purposes of determining whether that commitment survives the expiration of the contract by operation of law—on "the clear intent of Congress." *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 58. Indeed, the Board's crafting of its *Indiana & Michigan* rule is consonant with this Court's jurisprudence. In *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 374 (1974), for example, the Court stressed that "[n]o obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so." Accord *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. at 582.

c. The union acknowledges (Br. 39) that Congress did not intend the statutory obligation to bargain about terms and conditions of employment to include compulsory binding arbitration. The union argues nonetheless that Congress's concern about compulsory arbitration was limited, extending only to the initial decision to adopt that method of resolving disputes, as opposed to its continuance once

voluntarily adopted. But where an employer has agreed to arbitrate disputes only during the life of a contract, a requirement that it continue that commitment in effect beyond the intended duration abridges the employer's freedom to contract no less than does compelling it to agree to arbitration initially. The right not to agree to arbitrate includes the right to impose a time limitation on the agreement and to decline to arbitrate any disputes arising beyond that time.[5] Indeed, if an employer were compelled by operation of law to continue an agreement to arbitrate in effect until it had bargained to impasse over the terms of a new agreement,[6] the employer might be inclined to refuse to agree to arbitrate at all, or to impose stringent limitations on the types of disputes it would agree to arbitrate. Cf. *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 289 (1957) (declining, on similar grounds, to read Section 8(d) as prohibiting strikes for the entire duration of a contract with a midterm reopener clause). Such a result, in the Board's view, would undermine the federal labor policy favoring arbitration.

Against this backdrop, the Board has recognized that an agreement to arbitrate is "a voluntary surrender of the right of final decision which Congress has reserved to the [contracting] parties," and that

[5] The union recognizes that the contractual duty to arbitrate could be terminated by a contractual provision that "expressly provide[s] that grievances arising after the contract has expired are not arbitrable." Br. 17 n.8.

[6] An employer ordinarily is not entitled to change an existing term of employment unilaterally until an impasse has been reached on an overall contract proposal. See *Henry Miller Spring & Mfg. Co.*, 273 N.L.R.B. 472 (1984); *Bi-Rite Foods, Inc.*, 147 N.L.R.B. 59 (1964).

it is, "at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize." *Hilton-Davis Chem. Co.*, 185 N.L.R.B. 241, 242 (1970); accord *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 57. Absent a mutual agreement to arbitrate, the Board has determined, "the parties revert to the statutory scheme of 'free' collective bargaining, wherein each party must attempt in good faith to reach agreement, but is under no statutory mandate to reach agreement or to forfeit its right to utilize its economic power if no agreement can be achieved." *Hilton-Davis Chem. Co.*, 185 N.L.R.B. at 242; see also *NLRB* v. *Insurance Agents' Union*, 361 U.S. 477, 489 (1960) (Under the Act, the "necessity for good-faith bargaining between the parties, and the availability of economic pressure devices to each * * * party * * * exist side by side.").

Imposition of an obligation to arbitrate post-expiration contractual disputes as a matter of law would distort the statutory scheme. The arbitration agreement, which is the *quid pro quo* for the union's no-strike pledge, see *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 455 (1957), would continue in effect, thereby compelling the employer—against its will—to continue to cede its decisionmaking authority to an arbitrator and to forgo the use of economic weapons to resolve the dispute. Yet, the union would remain free to strike the employer in support of its demands, since the no-strike clause could not be enforced during this period without requiring the union to waive its statutory right to strike guaranteed by Section 13 of the Act, 29 U.S.C. 163.[7] The

[7] Section 13 of the Act, 29 U.S.C. 163, provides:

> Nothing in this [Act], except as specifically provided for herein, shall be construed so as either to interfere

employer's willingness to agree to arbitrate at all would be reduced if it were faced with the possibility of such a situation.

d. The union acknowledges (Br. 19, 44) that a no-strike commitment is contractual, that it would terminate with the expiration of the contract, and that the union would then be in a position to strike to change the existing terms and conditions of employment. The union contends, however, "that if *Katz* applied to arbitration clauses, [so that] the employer could not lock out in support of its position in a dispute about whether a certain action is inconsistent with the prior contract's norms," the Board could work out "a solution consistent with the statute, both in preserving the union's statutory right to strike and the overall balance of power between the parties." Br. 45-46. Thus, the union suggests that "where [a] union actually invokes the arbitration procedure with respect to a particular grievance," this "could then support the conclusion that there is a concomitant commitment not to strike concerning that grievance as well." Br. 46. In the alternative, the union suggests, "it is possible that [a] union could be required to express a willingness, for some period of time * * * not to strike over arbitrable grievances, before it could successfully invoke the arbitration clause in the first instance after contract expiration." Br. 46-47.

This proposal—which is premised on a union's willingness to continue its no-strike commitment—falls short of the mark. The union's solution does not resolve the situation where the employer seeks arbitration of contract hiatus grievances and the

with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

union responds that since those grievances fall outside the expired contract, the union remains free to strike over them. In those circumstances, the union's proposal would leave the union free to strike over the grievances, while the employer, because of the continuation of the arbitration procedure by operation of law, would be precluded from countering the strike with a lockout or other economic pressure. This imbalance could be corrected only by prohibiting the union from striking—a result that would collide with Section 13.[8]

In view of the pitfalls of applying the *Katz* doctrine to flesh out the duty to arbitrate post-expiration grievances, the Board's refusal to do so is not only "reasonably defensible," *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979), but precisely the sort of decision that—as this Court has repeatedly recognized—should be accorded considerable deference, see, *e.g.*, *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990); *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957).

[8] Contrary to the union's contention (Br. 46 n.30), arbitration is significantly different from earlier steps of the grievance procedure which, under the Board's *Indiana & Michigan* rule, survive the contract's expiration as a matter of law. As the Board has explained, those earlier steps—unlike arbitration—do not involve surrendering final decisionmaking authority to a third party. See *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 54.

The union's references (Br. 38, 41 n.25) to arbitration procedures unilaterally imposed by certain nonunion employers are beside the point. Those procedures—unlike the procedures resulting from collective bargaining—cannot be enforced under Section 301 of the LMRA and cannot operate as a waiver of the right to strike. See *United Food Workers Union, Local 7* v. *Gold Star Sausage Co.*, 897 F.2d 1022, 1026 (10th Cir. 1990).

3. Petitioner contends that, even if its contractual commitment to arbitrate included some post-expiration grievances, its blanket refusal to arbitrate post-expiration grievances did not amount to an unfair labor practice because "Congress did not choose to provide that a breach of a collective bargaining agreement would also be an unfair labor practice in violation of Section 8(a)(5)." Br. 14; see *id.* at 12-14. Petitioner did not raise that argument before the Board or the court of appeals.[9] Indeed, petitioner did not even raise that contention in its petition for a writ of certiorari. In these circumstances, the issue is not properly before the Court. *E.g.*, *Air Courier Conference* v. *American Postal Workers Union*, No. 89-1416 (Feb. 26, 1991), slip op. 4-5; *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 602-603 (1991); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner's contention is without merit. The Board has long held that

> [o]rdinarily, a breach of a collective-bargaining agreement, including a refusal to arbitrate, does not constitute a *per se* violation of Section 8(a)(5) of the Act. * * * [However], where an employer's breach of contract is so clear and flagrant as to amount to either a repudiation of the contract or a unilateral modification of it, the Board will find a violation of Section 8(a)(5).

Paramount Potato Chip Co., 252 N.L.R.B. 794, 796-797 (1980); accord *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 59; *GAF Corp.*, 265 N.L.R.B. 1361, 1364-1365 (1982); *United Tel. Co.*, 112 N.L.R.B. 779, 781 (1955).

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[9] See Section 10(e) of the Act, 29 U.S.C. 160(e); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982).

As we have explained (see NLRB Br. 3-7), before this Court's *Nolde* decision, the Board did not consider a blanket refusal to arbitrate grievances arising after the expiration of a collective bargaining agreement to be an unfair labor practice. The Board reasoned that such a refusal was not tantamount to a wholesale repudiation of the agreement to arbitrate because that agreement terminated when the contract expired. See *Hilton-Davis Chem. Co.*, 185 N.L.R.B. at 242. In light of *Nolde*, where this Court ruled that a commitment to arbitrate grievances presumptively survives the contract's expiration, the Board reexamined and clarified its position. As a result, the Board made clear that a blanket refusal to arbitrate grievances on the ground that the contract had expired would violate Section 8(a)(5), just as such a refusal during the contract's term would violate the Act. *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 59-60; see also NLRB Br. 4 n.4.

Here, petitioner did not refuse to arbitrate the grievances at issue for any good faith reason, such that the grievances did not arise under the contract. The record shows that petitioner categorically refused to arbitrate any post-expiration grievances, although it remained contractually obligated to arbitrate some of them. The Board found that this "generalized refusal to arbitrate * * * based on the expiration of the contract rather than the arbitrability of specific grievances" violated Seciton 8(a)(5) of the Act. Pet. App. B8. Such conduct, in the Board's considered judgment, is inconsistent with the requirements of Sections 8(a)(5) and 8(d), because the statutory duty to bargain in good faith requires the parties not only to bargain in good faith about negotiation of an agreement, but also to refrain from later unilaterally

repudiating the terms of that agreement. See, *e.g.*, *Paramount Potato Chip Co.*, 252 N.L.R.B. at 796-797; see also NLRB Br. 17-18. Accordingly, petitioner's belated attempt to shirk responsibility for its unlawful conduct must fail.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals concerning the Board's order declining to direct arbitration of the grievances should be reversed.

Respectfully submitted.

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No. 90-285

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LITTON FINANCIAL PRINTING DIVISION,
A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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This brief *amicus curiae* of the Chamber of Commerce of the United States of America (the "Chamber") is filed with the consent of the parties pursuant to Rule 37.3 of the Rules of this Court.

STATEMENT OF INTEREST

The Chamber's membership is composed of 180,000 companies and several thousand other organizations ranging from state and local chambers of commerce to trade and professional organizations. As the largest association of business and professional organizations in the United States, the Chamber serves as the principal voice of the American business community, regularly

representing the interests of its member employers in important labor relations matters affecting those interests before this Court, the lower courts, the United States Congress, the Executive Branch and the National Labor Relations Board. Such representation is an integral aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance these interests by filing briefs in a wide spectrum of labor relations litigation.[1]

The instant case raises a significant question the resolution of which will have a profound impact on the statutory bargaining rights of the Chamber's employer members: whether a collective bargaining agreement's arbitration clause, which is a delegation by the employer of its statutory right to bargain, survives the contract's termination as to all matters that were arbitrable during the term of the contract.

In *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977), this Court held that a severance pay provision over which the union sought arbitration remained arbitrable even after the expiration of the collective bargaining agreement. *Nolde* created a limited presumption in favor of post-expiration arbitrability based on the peculiar facts of that case. The aftermath of *Nolde* has been a tale of divided circuit courts of appeal, a division leaving employers uncertain as to whether the expiration date specified in a collective bargaining agreement has any effect at all with respect to the agreement's arbitration clause. On one end of the spectrum of lower court decisions is the Ninth Circuit's opinion in the instant case, which holds that if a dispute would have been arbitrable during

[1] E.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542 (1990); *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989); *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988); *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985).

the term of the contract, *Nolde* renders it arbitrable after the contract's expiration. On the other end of the spectrum are decisions which construe *Nolde* more narrowly, holding that a dispute is not presumptively arbitrable under *Nolde* after contract expiration unless it involves a right or benefit that accrues during the term of the contract and ripens after its expiration.[2]

The instant case invites this Court to revisit and clarify *Nolde* in a manner consistent with the normal and reasonable expectations of contracting employers. The filing of this brief will enable the Court to examine the perspective of employers who, as a collective group, are adversely affected by the Ninth Circuit Court of Appeals' misapplication of *Nolde*. That misapplication results in a judicially implied waiver by employers of their statutory right to bargain over grievances after a contract's termination. The waiver of such a fundamental bargaining right should not be presumed or implied, but, as with other statutory rights, should be deemed waived only when the waiver is "clear and unmistakable."[3]

SUMMARY OF ARGUMENT

In *Nolde*, this Court held that a severance pay dispute which arose after the expiration of a collective bargaining agreement remained arbitrable notwithstanding the contract's expiration. In holding that such a dispute was presumptively arbitrable even after expiration of the collective bargaining agreement, the Court took care to note the union's argument that the severance pay amounted to *deferred* compensation, compensation to which an em-

[2] *See, e.g., United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co.*, 897 F.2d 1022, 1024-25 (10th Cir. 1990); *Chauffeurs, Teamsters and Helpers, Local Union 238 v. C.R.S.T., Inc.*, 795 F.2d 1400, 1403 (8th Cir.) (*en banc*), *cert. denied*, 479 U.S. 1007 (1986).

[3] *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

ployee may remain entitled even after the expiration of the collective bargaining agreement. The *Nolde* Court, then, expressly ordered post-expiration arbitration based on the union's insistence that the severance pay at issue was deferred compensation.

In contrast to *Nolde*'s narrow holding, the court below in the case at bar held that a post-expiration dispute is arbitrable if it would have been arbitrable during the term of the contract. The Ninth Circuit's unduly expansive reading of *Nolde* is contrary to the intent of the Court in *Nolde* because it contravenes well-established principles that arbitration is consensual. The lower court's blanket application of *Nolde* to all post-expiration disputes automatically nullifies the employer's post-expiration right to bargain without any requirement that the waiver of such a fundamental statutory right be clear and unmistakable. A correlative inconsistency is that a union is not presumed to have waived its post-expiration statutory right to strike, despite the fact that a no-strike obligation is the presumptive *quid pro quo* for an agreement to arbitrate.

These bargaining inequities and their resultant harm to the collective bargaining process were not intended by the Court in *Nolde*. Accordingly, *Nolde* should be clarified in a manner that is consistent with the employer's statutory right to bargain. The presumption should apply only to accrued or deferred compensation because such benefits are earned during the term of the contract and will often ripen or become payable as an entitlement after the contract's expiration. As to other types of post-expiration disputes, such as the seniority provision at issue here, an employer should be deemed to have waived its post-expiration statutory right to bargain only if such waiver is clear and unmistakable. The record in the present case clearly demonstrates that petitioner made no such waiver.

BACKGROUND

Petitioner Litton Financial Printing Division ("Litton") was party to a collective bargaining agreement with Printing Specialties District Council Number 2 ("the union"). By its terms, the contract expired on October 5, 1979. Some eleven months subsequent to that date, Litton discharged ten employees as a result of its decision to shut down a particular "cold-type" operation at its Santa Clara, California plant. The discharged employees worked solely or primarily in the discontinued operation. No collective bargaining agreement was in effect at the time of these layoffs. The union filed grievances alleging that the layoffs violated a provision of the expired contract which provided that "in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal." (J. App. at 30).

The question presented to the National Labor Relations Board ("the Board") was whether the seniority provision at issue survived the expiration of the parties' last collective bargaining agreement under the Supreme Court's holding in *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977). In *Nolde*, the Supreme Court held that a severance pay dispute occurring after expiration of the collective bargaining agreement remained arbitrable in the absence of an explicit manifestation by the parties that the arbitration clause was not to survive the termination of the contract. In so holding, the Court created a presumption in favor of the arbitrability of disputes "arising under" an expired contract.

The Board applied its holding in *Indiana & Michigan Elec. Co.*, 284 NLRB 53, 60 (1987), to the instant case. In *Indiana & Michigan*, the Board held that "a dispute based on postexpiration events 'arises under' the contract within the meaning of *Nolde* only if it concerns contract rights capable of accruing or vesting to some degree dur-

ing the life of the contract and ripening or remaining enforceable after the contract expires." Applying this formulation to the disputed seniority provision, the Board held that the dispute concerning the provision was not arbitrable post-expiration because "[t]he right to layoff by seniority if other factors such as ability and experience are equal is not 'a right worked for or accumulated over time.'" *Litton Financial Printing Division, A Division of Litton Business Sys., Inc.*, 286 NLRB 817, 821 (1987).

Purporting to apply the Board's *Indiana & Michigan* standard, but in fact applying a much broader interpretation of *Nolde*, the United States Court of Appeals for the Ninth Circuit reversed the Board's determination. *NLRB v. Litton Financial Printing Division, A Divison of Litton Business Sys., Inc.*, 893 F.2d 1128 (9th Cir. 1990).

I. *NOLDE*'S PRESUMPTION IN FAVOR OF ARBITRABILITY IS BEST UNDERSTOOD AND MOST PRACTICABLE WHEN LIMITED TO THE FACTS OF THAT CASE.

A. The Court Below Expanded *Nolde*'s Holding Beyond What The *Nolde* Court Intended.

There are longstanding precepts of collective bargaining on which employers continue to rely in negotiating agreements but that are threatened by the Ninth Circuit's expansive holding in the instant case. Principal among these collective bargaining precepts is that arbitration is consensual. An employer has a statutory duty, and right, to bargain over grievances both during the term of a collective bargaining agreement and, as in the instant case, after the contract has expired.[4] The duty to bargain,

[4] Section 8(a)(5) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(5), deems it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." Section 8(d) of the Act,

however, is distinct from a duty to arbitrate. Arbitration is the consensual delegation to a third party by the employer of its statutory right to bargain over grievances. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."); *Hilton-Davis Chem. Co.*, 185 NLRB 241, 242 (1970) ("The mutual commitment of contract parties to consider interstitial disputes through a grievance procedure and, failing agreement, to submit them to binding arbitration is a voluntary surrender of the right of final decision which Congress has reserved to these parties."). The National Labor Relations Act imposes no duty on an employer to agree to arbitrate. *See* 29 U.S.C. § 158(d) (obligation to meet and confer regarding terms and conditions of employment "does not compel either party to agree to a proposal or require making a concession"). Indeed, the employer's delegation of its statutory right to bargain over grievances is considered so valuable and beneficial to the union that courts will imply as *quid pro quo* for such delegation a no-strike obligation on the part of the union. *See Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co.*, 369 U.S. 95, 104-05 (1962).[5] Thus, any waiver by the employer of

29 U.S.C. § 158(d), delineates the basic bargaining rights and duties of employers and unions:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

[5] *See also Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 247-48 (1970); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 381-82 (1974).

its valuable bargaining right by delegation of such right to a third-party arbitrator—like the waiver of other statutory rights—must be "clear and unmistakable." *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

This Court in *Nolde*, 430 U.S. 243, was not unaware of these longstanding principles when it held that union members' claims for severance pay were arbitrable notwithstanding the fact that such claims arose after the expiration of the collective bargaining agreement. *See id.* at 252. Nor is it reasonable to assume that the *Nolde* Court was engaging in the impermissible act of construing one statutory provision—29 U.S.C. § 173(d)[6]—in a manner which renders the employer's statutory bargaining right nugatory.[7]

Rather, *Nolde*'s holding must be read in the context of the limiting facts of that case, and when so read, is not inconsistent with the employer's statutory right to bargain. While *Nolde* is undeniably in need of clarification, the rule announced by the Court in *Nolde* is a reasonable one when limited to factually similar cases—i.e., disputes arising over benefits that vest or accrue during the term of the contract, arguably amounting to deferred compensation.[8]

[6] Section 173(d) provides: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an *existing* collective-bargaining agreement." (Emphasis supplied.)

[7] *Cf. Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

[8] There are, of course, some post-expiration disputes whose triggering events occur during the term of the contract but for which arbitration proceedings do not begin until after the contract's termination. As to these situations, the *Nolde* Court stated, "[I]t could not seriously be contended . . . that the expiration of the contract would terminate the parties' contractual obligation to resolve such a dispute in an arbitral, rather than a judicial forum." 430 U.S. at 251. *See also Glover Bottled Gas Corp. v. Local Union No. 282, Int'l Brotherhood of Teamsters*, 711 F.2d 479, 481 (2d Cir. 1983) (Friendly, J.) (theft implicating employees and notice by employer of its intent to dismiss employees for refusal to take polygraph tests all occurred during contract term; held: although employees' discharges occurred after expiration of the contract, *Nolde* mandated arbitration based on "just cause" provisions of the expired contract since the basic dispute arose before the contract's termination).

The dispute in *Nolde* involved severance pay, which the union in that case contended was in the nature of *deferred* compensation, like vacation pay or pension benefits. The union argued that the severance wages over which it sought post-contract expiration arbitration were a vested entitlement that was payable only upon termination of employment. 430 U.S. at 248. Given this, the union maintained, the fact that an employee's termination occurs after the expiration of the contract which conferred the benefit is immaterial. In short, money earned was money due.

This Court saw no reason why parties could not agree to the delayed receipt of a contract entitlement, severance pay, which in accordance with the union's argument, "was nothing more than deferred compensation." *Id.* at 248-49 n.4. The Court's recitation of the union's arguments and the factual context in *Nolde* was not gratuitous. The Court ordered post-expiration arbitration based "on this record"—the record established by the union and employer. *Id.* at 255. It is thus unreasonable to interpret *Nolde* as holding that all post-expiration grievances are arbitrable to the same extent as pre-expiration grievances. That is, however, precisely what the Ninth Circuit did in the case at bar.

B. The Court Below Failed To Heed The Limiting Facts Upon Which *Nolde* Was Decided.

From the standpoint of the employer, the problem with the Ninth Circuit's application of *Nolde* in the instant case is that the court divorced *Nolde*'s holding from its

facts, creating an ambush-like presumption that marries the employer to the arbitration clause of an expired contract no matter what the nature of the post-expiration dispute. In *Indiana & Michigan Elec. Co.*, 284 NLRB 53 (1987), however, the Board fashioned a more reasonable rule to determine whether a particular grievance brought after the expiration of a contract was arbitrable under *Nolde*. Consistent with *Nolde*, the Board held that parties are bound to arbitrate post-expiration disputes only if (1) such disputes are over rights arising under the expired contract and (2) the contract lacks language sufficient to negate the presumption favoring post-expiration arbitration of the latter disputes. *Id.* at 60. "[A] dispute based on postexpiration events 'arises under' the contract within the meaning of *Nolde* only if it concerns contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." *Id.*

Purporting to apply the *Indiana & Michigan* standard, the Ninth Circuit inexplicably held in the instant case that the "seniority" at issue arose under the expired contract. However, the seniority dispute in this case plainly does not "arise under" the expired contract within the meaning and intent of *Nolde*. The Ninth Circuit appears to have viewed seniority in its denotative sense, concluding that because seniority is a status that, like age, continues to increase during the term of the contract, it fits within the formulation of *Indiana & Michigan*. Seniority, however, is not itself a vested benefit; it is merely an age-like condition which, absent contractual language to the contrary, is devoid of import beyond the life of a collective bargaining agreement. *See United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co.*, 897 F.2d 1022, 1026 (10th Cir. 1990) ("'Seniority is not only born from the collective bargaining agreement; it does not exist apart from that contract.'") (citation omitted). Although the disputed right in the instant case involved seniority, the right itself (seniority protection against layoffs) was not a vested benefit.

The contract merely provided that "[i]t is also understood that in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal." (J. App. at 30). Unlike the severance pay or arguable deferred compensation involved in *Nolde*, this right was not something that was worked for and in which an employee could therefore claim a continuing property interest.

Any other construction of the disputed provision would make the term seniority a talisman for the invocation of post-expiration arbitration. Seniority is implicated in many contractual matters, such as order of layoffs and preferences in promotions.[9] Because seniority is a ubiquitous concept, the Ninth Circuit's approach would mean that the mere invocation of the term through artful pleading would ensure arbitrability. This result stretches the *Indiana & Michigan* test and its genesis, *Nolde*, beyond recognition. It also extends the valuable right to arbitrate grievances well beyond the reasonable and fair expectation of contracting employers.

Accordingly, though it purported to do so, the court below did not defer to the Board's construction of Litton's statutory duty to bargain. *See NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990) (Board rule entitled to deference as long as it is rational and consistent with the Act).[10]

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[9] Importantly, in referring the severance pay dispute to arbitration, the Court in *Nolde* focused on the union's deferred compensation argument, not the seniority which simply determined the amount of severance pay. *See* 430 U.S. at 246, 249. The *Nolde* Court ordered arbitration because the severance pay was arguably in the nature of accrued deferred compensation, not because severance pay was calculated on the basis of seniority.

[10] The court of appeals found that the Board had inconsistently applied its "arising under" standard and cited two Board decisions involving post-contract expiration seniority disputes that purportedly diverged from the Board's decision in the instant case.

C. The Ninth Circuit Instead Applied Its Own Overbroad Interpretation Of *Nolde*, Thereby Making Virtually All Contractual Matters Arbitrable After A Contract's Expiration.

Rather than follow the Board's *Indiana & Michigan* test for determining when a grievance "arises under" an expired contract, the court below admittedly "construed much more expansively the *Nolde* presumption of arbitrability of post-expiration grievances . . . ." *NLRB v. Litton Financial Printing Division*, 893 F.2d at 1138. The court specifically relied on language in *Nolde* that "'where the dispute *is over a provision of the expired agreement*, the presumptions favoring arbitrability must be negated expressly or by clear implication.'" *Id.* (quoting *Nolde*, 430 U.S. at 255) (emphasis added by circuit court). Removing the language of *Nolde* from its factual context, the Court held, in effect, that a post-expiration grievance is arbitrable merely if it is related to a provision of the expired contract that was arbitrable during the contract's term.[11]

See UPPCO, Inc., 288 NLRB 937 (1988) and *United Chrome Products, Inc.*, 288 NLRB 1176 (1988). In *United Chrome Products*, however, the Board specifically distinguished *Litton*, 288 NLRB at 1177, and in *UPPCO*, the Board found that the specific *language* of the parties' contract brought the post-expiration grievance within *Nolde*'s holding, 288 NLRB at 940.

In any event, any perceived inconsistencies between the latter decisions and the Board's decision in the instant case are insufficient grounds on which to refuse to defer to the Board's judgment. Certainly the Board cannot be accused of "'gloss[ing] over or swerv[ing] from prior precedents without discussion.'" *Cf. Curtin Matheson*, 110 S. Ct. at 1556 n.2 (Blackmun, J., dissenting) (citations omitted). Even if the Board at times has strayed from the true meaning and intent of *Nolde*, that is no basis for perpetuating the misapplication, let alone, as the court did here, to expand the misapplication.

[11] The court below also found that other Ninth Circuit precedent was consistent with its interpretation of *Nolde*. *See, e.g., Local Joint Executive Bd. of Las Vegas, Culinary Workers Union, Local*

In holding as it did, the court below followed the tack of other courts which have construed *Nolde* more broadly than warranted. *See, e.g., Seafarers Int'l Union v. National Marine Servs.*, 820 F.2d 148, 154 (5th Cir.), *cert. denied*, 484 U.S. 953 (1987) ("The scope of the rule articulated by the Supreme Court in *Nolde* is broad: disputes grounded on a collective bargaining agreement containing an arbitration clause are arbitrable even after expiration of the agreement unless the arbitration clause states otherwise."); *Federated Metals Corp. v. United Steelworkers*, 648 F.2d 856, 861-62 (3d Cir.), *cert. denied*, 454 U.S. 1031 (1981) (Where dispute turns on differing interpretations of the expired agreement, the dispute arises under the expired contract and the duty to arbitrate survives.).

The broad holdings of these cases leave open the possibility that even "just cause" termination clauses would automatically remain arbitrable for post-expiration terminations. *Cf. Chauffeurs, Teamsters and Helpers, Local Union 238 v. C.R.S.T., Inc.*, 795 F.2d 1400, 1403 (8th

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226 v. Royal Center, Inc., 796 F.2d 1159 (9th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987). *Royal Center*, as interpreted by the court below, applied the following test to determine the survivability of an arbitration clause: "whether [in light of the parties' original intent] a particular type of grievance would have been arbitrable if circumstances unanticipated by the parties when the agreement was drafted had not arisen." 893 F.2d at 1138. In addition to begging the question presented by the instant case, the latter inquiry is not germane because the expiration of a contract is virtually always anticipated by the parties. Thus, unlike *Royal Center*, "[w]e do not have before us the unusual situation in which unanticipated events have caused the termination of the collective bargaining agreement and ordering arbitration is the only way to preserve the parties' original intent." *Gold Star*, 897 F.2d at 1025 n.2 (also distinguishing *Royal Center*). In any event, to the extent that *Royal Center* and other Ninth Circuit precedent hold that all post-expiration disputes that would have been arbitrable during the term of a contract are also arbitrable after the contract's termination, those cases, like the instant case, are fundamentally flawed.

Cir.) (*en banc*), *cert. denied*, 479 U.S. 1007 (1986) (rejecting this argument by limiting the *Nolde* presumption to rights "which to some degree have vested or accrued during the life of the contract and merely ripened after termination"). Indeed, under the approach of the Ninth, Third and Fifth Circuits, *all* matters arbitrable during the term of the contract are arbitrable after the contract's expiration. It is inconceivable that this Court intended this type of indiscriminate application of the *Nolde* presumption.

II. INDISCRIMINATE APPLICATION OF THE *NOLDE* PRESUMPTION DEROGATES FROM THE EMPLOYER'S STATUTORY RIGHT TO BARGAIN EVEN THOUGH THE EMPLOYER HAS NOT CLEARLY AND UNMISTAKABLY WAIVED THIS RIGHT.

A. *Nolde* Is Not *AT&T Technologies*.

As is evident, the Ninth Circuit's broad interpretation of *Nolde*'s presumption favoring post-expiration arbitrability is indistinguishable from the arbitrability determination which courts make during the term of the contract. When construing an effective contract, "where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense of '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 650 (1986) (citation omitted). As in *AT&T Technologies*, no distinction is drawn in the instant case between the types of disputes—the presumption is applied wholesale. It is thus difficult to ascertain where *AT&T Technologies* ends and *Nolde* begins. If the Supreme Court intended that the continuum between these two cases be seamless, then the union's and employer's rights must be the same whether the claim of arbitrability arises during the term of the

contract or after its expiration. However, such is not the case.

1. Indiscriminate Application of *Nolde* Creates Bargaining Disparities Which Are Harmful to the Bargaining Process.

AT&T Technologies recognizes that "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" 475 U.S. at 648 (citation omitted). This principle derives from the fact that arbitration is a voluntary waiver of the parties' statutory right to bargain under Section 8 of the Act. *Hilton-Davis Chem. Co.*, 185 NLRB 241, 242 (1970). "Absent mutual consent, the parties revert to the statutory scheme of 'free' collective bargaining, wherein each party must attempt in good faith to reach agreement, but is under no statutory mandate to reach agreement or to forfeit its right to utilize its economic power if no agreement can be achieved." *Id.* This Court has held that a waiver of a statutorily protected bargaining right must be "clear and unmistakable." *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

Yet applying the *Nolde* presumption to *all* post-expiration disputes that would have been arbitrable during the term of the contract effectuates a silent waiver by the employer of its statutory right to bargain. Not only is this waiver achieved in contravention of the "clear and unmistakable" standard, the waiver is also illogical in the absence of a concomitant waiver by the union of its right to strike. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957) (no-strike clause is the *quid pro quo* for an agreement to arbitrate grievances).

Courts have recognized that "[i]f the arbitration clause survives termination under *Nolde* and the coterminous no-strike clause does not, the employer remains bound to arbitrate, although it is deprived, in part at least, of the consideration flowing to it from its agree-

ment to arbitrate, *i.e.* the no-strike clause." *See United Steelworkers v. Fort Pitt Steel Casting Division—Conval-Penn, Inc.*, 635 F.2d 1071, 1076 (3d Cir. 1980), *cert. denied*, 451 U.S. 985 (1981) (footnote omitted). Accordingly, the duty to arbitrate post-expiration exists only if and to the extent that the union's no-strike obligation survives. *Goya Foods, Inc.*, 238 NLRB 1465, 1467 (1978) ("[I]t would indeed be anomalous if an employer who would be contractually bound to arbitrate a certain dispute after contract expiration could still be subjected to economic pressure that would be protected."). Because the union's waiver of its statutory right to strike "during the life of the collective-bargaining agreement is not a 'clear and unmistakable' waiver . . . of the right to strike beyond the contract term," *see Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986) (citation omitted), an employer's agreement to arbitrate during the term of a contract is likewise not a clear and unmistakable waiver of its statutory right to bargain beyond the contract term. Any other result would unfairly and disproportionately derogate from the employer's statutory right.[12]

2. An Overbroad Application of *Nolde* Creates Other Disruptive Disparities in Addition to the Employer's Loss of *Quid Pro Quo* for Agreeing to Arbitrate.

A broadly construed *Nolde* presumption also unfairly benefits the union and interferes with the dynamics of the collective bargaining process in other ways that are related

[12] Ironically, in rejecting Litton's argument that the *union* waived its right to bargain over the effects of Litton's shutting down its "cold-type" operations, the court below recognized that "a contractual waiver of the right to bargain about a mandatory subject of bargaining must be . . . *clear and unmistakable*." *NLRB v. Litton Financial Printing Division*, 893 F.2d at 1135 n.6 (emphasis added). It is perplexing that the court applied this standard to the union's statutory bargaining right but not to the employer's vis-a-vis the post-expiration arbitration issue.

to the employer's loss of *quid pro quo* for its agreement to arbitrate. In the case at bar, the original contract provided, in addition to an "expiration date", that "the stipulations set forth shall be in effect for the time hereinafter specified." (J. App. at 22). *Nolde* should not be interpreted to render contract expiration clauses nugatory as to all arbitrable matters. While such would be a boon for the union, this disregard of unambiguous contractual language places the employer in an untenable position of uncertainty and powerlessness. The employer cannot be certain about the effectiveness of the contract's expiration date, but the union can sit smugly knowing that arbitration will be available in most instances.

Moreover, blanket application of the *Nolde* presumption to all post-expiration contractual disputes actually *defeats* the national policy favoring arbitration of labor conflicts. An employer who knows that an agreement to arbitrate during the term of the contract can be spawned into a self-perpetuating waiver of the employer's statutory right to bargain will have less incentive to agree to arbitration to begin with.

A further problem inherent in an overly broad application of the *Nolde* presumption is that a union has less incentive to bargain in light of the added assurance that the arbitration clause lives on. This is especially so, where, as implied by the court below, the arbitration obligation survives indefinitely. In the instant case, the grievances claimed to be arbitrable did not even arise until nearly eleven months after the expiration of the contract. In *Nolde*, however, only four days separated the expiration of the contract and the filing of the grievances. The *Nolde* Court cautioned that it expressed no opinion "as to the arbitrability of post-termination contractual claims which . . . are not asserted within a reasonable time after the contract's expiration." 430 U.S. at 255 n.8. If the union in the instant case were allowed to arbitrate its grievances some eleven months after the

contract's expiration, this result would effectively " 'impose a self-perpetuating system of arbitration in place of normal collective bargaining.' " *Fort Pitt Steel*, 635 F.2d at 1079 n.5 (citation omitted).

B. The Circuit Court's Misapplication Of The *Nolde* Presumption Accomplished Indirectly What The Union Sought To Do Directly—To Apply The "Unilateral Change Doctrine" To An Arbitration Clause.

The union in the case at bar argued below that Litton's refusal to arbitrate constituted a unilateral change in a term or condition of employment before an impasse had been reached and thus violated the doctrine of *NLRB v. Katz*, 369 U.S. 736 (1962). Under *Katz*, unless an employer first bargains to impasse, it commits an unfair labor practice by unilaterally changing the terms and conditions of employment after the expiration of a collective bargaining agreement. *See id.* at 736. *Katz*, however, left unmodified the union's right to exert economic pressure on the employer after expiration of the contract. *See id.* at 741 n.7, 747 (citing *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960)).[13] The terms

[13] In *Insurance Agents*, union workers participated in a work "slow down" after expiration of their collective bargaining with Prudential Insurance, the employer. The Board ruled that the union's exertion of economic pressure on the employer during negotiations for a new contract constituted a refusal to bargain in good faith in violation of Section 8(b)(3) of the Act. This Court disagreed with the Board's construction of the union's 8(b)(3) duty to bargain, holding that the Board's branding of the union's economic activity against its employer as violative of Section 8(b)(3) amounted to a usurpation by the Board of the union's right use of economic weapons to achieve substantive resolution of its differences with the employer. 361 U.S. at 488-89. In so holding, the Court observed that "[t]he Board freely (and we think correctly) conceded here that a 'total' strike called by the union would not have subjected it to sanctions under § 8(b)(3), *at least if it were called after the old contract, with its no-strike clause, had expired.*" *Id.* at 491 (emphasis added).

As the *Katz* Court expressly disclaimed any inconsistency between its decision and *Insurance Agents*, it is clear that even under

which *Katz* envisioned could not be unilaterally changed prior to impasse were not terms like arbitration that go to the heart of the employer's right to bargain rather than delegate decision-making to a third party arbitrator. Were the holding of *Katz* otherwise, courts would then be compelled to imply a no-strike obligation as presumptive *quid pro quo* for the employer's agreement to arbitrate. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co.*, 369 U.S. 95, 104-05 (1962); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 247-48 (1970); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 381-82 (1974).

Because it concluded that the Board erred in applying *Indiana & Michigan*, the court of appeals in the instant case found it unnecessary to address the union's *Katz* argument. Yet, by holding that the arbitration clause in this case survived the contract's expiration, the court reached the same result as would have been achieved had it adopted the union's erroneous reading of *Katz* as a free-standing opinion, divorced from other precedents which, taken as a whole, hold that an obligation to arbitrate is presumptively coterminous with the union's no-strike commitment. *Lucas Flour*, 369 U.S. at 104-05; *Boys Markets*, 398 U.S. at 247-48; *Gateway Coal*, 414 U.S. at 381-82.

As the Board stated in *Hilton-Davis*, and reaffirmed in the instant case, "arbitration is a voluntary surrender of the right of final decision which Congress has reserved to [the bargaining] parties." 185 NLRB at 242. Nothing in Section 8(d) compels surrender of this right. *See id.* Yet the union's view and the Ninth Circuit's holding effectively compel surrender merely because an employer voluntarily surrendered its right during the term of the contract. Indirectly, the union has been granted its wildest fantasy of applying *Katz* to an arbitration

Katz a union's waiver of its right to strike does not extend beyond the term of the contract.

clause without incurring a continuing no-strike obligation. But if the unilateral change doctrine does not countenance such an outcome, *Nolde* certainly should not be interpreted so broadly as to achieve the same forbidden result.

III. *NOLDE* SHOULD BE CLARIFIED IN A MANNER THAT RENDERS ITS PRESUMPTION CONSISTENT WITH THE EMPLOYER'S STATUTORY RIGHT TO BARGAIN.

The *Nolde* presumption should be limited to post-expiration disputes involving accrued benefits that are in the nature of deferred compensation. Such a limitation distinguishes *Nolde*'s presumption from that of *AT&T Technologies* on the basis of the type of contract right that is grieved post-expiration. Were the *Nolde* presumption applied to all post-expiration disputes that are arguably related to a provision of an expired agreement, employers would unintentionally waive their statutory bargaining rights, notwithstanding the existence of an explicit contract expiration date and even though the union is seemingly free to exploit the contract's expiration by exerting economic pressure on employers. This undesirable consequence is avoided by interpreting *Nolde* in light of its limiting facts and restricting the *Nolde* presumption to post-expiration disputes involving deferred compensation rights.

Because rights to accrued or deferred compensation are particularly susceptible to ripening after the expiration of the contract, *Nolde*'s limited presumption favoring post-expiration arbitrability is not unduly destructive of the parties' bargaining expectations or the employer's right to bargain. It is one thing to imply a limited delegation of the employer's post-expiration statutory rights to allow arbitration of disputes involving employee benefits that vested during the term of the contract and which arguably became payable after the contract's expiration. This is a reasonable reading of *Nolde*. It is quite another

matter, however, to imply a wholesale waiver of the fundamental statutory right to bargain as to any matter that was arbitrable during the term of the contract. That is what the court below did in the instant case.

Although *Nolde* is properly applied to post-expiration disputes over benefits in the nature of deferred compensation, the prevailing standard for waiver of the statutory right to bargain as to other kinds of post-expiration disputes, such as the seniority provision at issue here, should not differ from the waiver standard required during the term of a contract: a party's waiver of its statutory right to bargain should be "clear and unmistakable." An expired contract merely containing a provision relevant to a post-expiration dispute hardly amounts to that kind of waiver. This overly broad and mechanical application of *Nolde* would defeat this Court's command that the adequacy of a waiver must be determined by the "specific circumstances of each case." *See Metropolitan Edison*, 460 U.S. at 709. Thus, for the sake of making the *Nolde* presumption consistent with the employer's statutory right to bargain and this Court's precedents on waiver of that right, *Nolde* should be applied only in limited circumstances involving deferred compensaiton or benefits that accrue or vest during the term of the contract which cannot be eliminated or divested simply by expiration of the contract.

Under the Ninth Circuit's approach, contract expiration dates cease to be meaningful. Moreover, employers are disadvantaged by the inability to use their economic powers to bargain, while unions do not seem to incur a similar disadvantage. Finally, arbitration clauses have an indefinite, self-perpetuating duration. Other cases offer a more reasoned approach. In *United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990), the union, like the union in the instant case, argued that despite expiration of the collective bargaining agreement, the contract's seniority provisions lived on. The Tenth Circuit rejected this con-

tention, holding that "'[s]eniority is not only born from the collective bargaining agreement; it does not exist apart from that contract.'" *Id.* at 1026 (citation omitted).

In so concluding, the court in *Gold Star* followed the view of the Eighth Circuit that the *Nolde* presumption is to apply only to post-expiration disputes arising under the expired contract and that "to 'arise under' the expired contract, a dispute 'must either involve rights which to some degree have vested or accrued during the life of the contract and merely ripened after termination, or relate to events which have occurred at least in part while the agreement was still in effect.'" *Id.* at 1024-25 (quoting *Chauffeurs, Teamsters and Helpers, Local Union 238 v. C.R.S.T., Inc.*, 795 F.2d 1400, 1403 (8th Cir.) (*en banc*), *cert. denied*, 479 U.S. 1007 (1986)). The *Gold Star* court observed "that the Eighth Circuit's interpretation of *Nolde Brothers* strikes the proper balance between . . . two important principles of labor law . . .: the idea that 'the arbitration duty is a creature of the collective-bargaining agreement and that a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so,' and the 'well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective-bargaining agreements.'" *Id.* at 1025-26 (citations omitted).

The instant case requires that this Court balance the same strong, co-existing policies of federal labor law as did the Tenth and Eighth Circuits. This task, however, should be less an assay of first impression than a reaffirmation of *Nolde* in light of the facts on which that case was decided. Contrary to the Ninth Circuit's approach in the instant case, the question is not whether a dispute "arises under" an expired contract in the sense that had it arisen during the term of the contract, it would have been arbitrable. This reading of *Nolde* would allow an expired contract's arbitration provision to continue in

perpetuity, elevating the union's statutory bargaining rights above the employer's. There must be a more precise guidepost as to when a dispute is arbitrable post-expiration, and the most reasonable guidepost is the one logically inferred from the facts on which *Nolde* was decided—disputes involving benefits that are in the nature of deferred compensation.

CONCLUSION

For all the foregoing reasons, the Ninth Circuit's decision rejecting the Board's determination that the seniority at issue in the present case was not arbitrable under *Nolde* should be reversed.

Respectfully submitted,

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